An exploration of the legal minefield of retention of title clauses

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Summary:

This thesis explores how the functional objectives of retention of title clauses, as a commercial mechanism, are hindered by significant legal uncertainty and judicial disfavour. A comprehensive critique of the law governing retention of title clauses is provided and the fundamental problems of a conceptual and practical nature for those parties seeking to rely on retention of title clauses in the event of insolvency are examined. This thesis demonstrates how retention of title clauses have been inadequately treated by the courts, which has invariably led to controversial implications and nuances in application. Areas of legal uncertainty, inconsistency and unpredictability are highlighted to illustrate the difficulties encountered under the present legal regime. The discussion will also challenge recent judicial decisions which have arguably produced contradictory outcomes and have significantly contributed to the uncertainty of this area of law. It is submitted that the unsatisfactory application of the law can be consistently evidenced across the breadth of legal fields in which these clauses are prevalent, a remit which extends far beyond the law of sales and subsequently, ventures into the law of property, contract law, the law of agency, company charges, and corporate insolvency. The arguments put forward will demonstrate that there is still substantial difficulty in resolving claims of retention of title and that the legal uncertainty is exacerbated by weak rationalisation of legal rules, inconsistent interpretation of the clauses in case law and a general reluctance by the courts to enforce claims pertaining to title retention.

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CHAPTER 1: INTRODUCTION

1. Introduction

Retention of title[1] clauses are considered to be a useful mechanism in the world of commerce and have been prevalent for quite some time.[2] Their significance and proliferation as a commercial mechanism surged in popularity following the 1976 Court of Appeal decision in *Romalpa.*[3] The combined impact of both the *Romalpa* case and the unlitigated but highly publicised Brentford Nylons insolvency, have both been deemed contributable factors for the clauses becoming so prolific in commercial contracts.[4] Since 1976, there has been a rapid transition from being a largely unused clause to such clauses becoming an integral component of boilerplate agreements of sale.[5] The proliferation of retention of title clauses in England and Wales has since been described as spreading like a 'dreadful weed,'[6] a testament to their ubiquitous nature. The growth in use of retention of title clauses can also be attributed to their functional objective as a means of conveniently providing protection for suppliers and manufacturers of goods. Retention of title clauses provide sellers a way of addressing some of their primary business concerns: the risk of non-payment and a buyer's insolvency. An incorporated retention of title clauses reduces such an eventuality by stipulating that the seller will retain ownership of the goods until certain specified conditions have been satisfied, irrespective of delivery. In most common circumstances the conditions will stipulate that ownership/ title will not pass until the buyer's financial obligations to the seller have been satisfied in full. Thus, in its simplest form retention of title clauses ensures that the buyer will not become an owner of the goods until the seller has been paid. Accordingly, one of the main objectives of the clauses is to provide sellers an economic lifeline in the event of a non-paying/ insolvent buyer. However, despite the clauses deceivingly simple premise, a growing disconnect has materialised between recent judicial decisions on retention of title clauses and their commercial practicality. Despite the proliferation of the clauses in contractual agreements, the core of the issue lies with existing uncertainty as to when the clauses are legally valid and effective. As will be discussed, the law governing retention of title

[1] Otherwise known as 'reservation of title' or 'Romalpa clauses' named after the infamous Court of Appeal case *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd* [1976] 1 W.L.R 676.
[2] The basic principle can be traced back as far as 1895 by the House of Lords in the Irish case of *Alexander Knox McEntire v Crossley Bros* [1895] A.C. 457 HL as per Lord Herscell at [462].
[3] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd* [1976] 1 W.L.R 676.
[4] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales" (2018) *Journal of Business Law,* 229-254, at 234.
[5] J Davey and C Kelly "Romalpa and Contractual Innovation" (2015) 42 *Journal of Law and Society* 358-386, at 359.
[6] I Davies, *Effective Retention of Title,* London: Fourmat Publishing, 1991, at 10.

clauses is compounded by both legal uncertainty and a general reluctance to enforce retention of title claims. The uncertainty of this area is also exacerbated by weak rationalisation of legal rules and an inconsistent interpretation of the clauses in case law.

The issues surrounding retention of title clauses can be evidenced by an influx of case law, which has produced contradictory and unpredictable results. These controversial decisions have caused significant problems of both conceptual and practical nature for those parties seeking to rely on such clauses. Consequently, the uncertainty of the law in this area undermines the overall commercial utility and functional effectiveness of retention of title clauses. There are ever-increasing situations where retention of title clauses will be struck down by the courts and thus, the clauses will not be an effective legal mechanism for the seller. The apparent eagerness of the courts to strike down certain types of retention of title clause, is detrimental to the claimant relying on the clauses as the clauses fail to provide the level of protection expected from the contractual clause. As such, retention of title clauses as a legal mechanism are hindered from achieving their functional objectives by legal uncertainty and a general reluctance observed by the courts to enforce retention of title claims. The uncertainty stems from the English[7] courts dogmatic and indecisive approach to retention of title clauses whereby the courts fail to achieve a degree of consistency, preferring rigid contractual interpretation to reaching commercially sensible decisions. As emphasised by Sealy, 'the position of sellers would not be quite so dismal if the courts could be persuaded to think that some issues deserve to be examined less perfunctorily and given more serious and thorough consideration than has been the case to date.'[8] The historic protection once offered by such clauses has now been detrimentally undermined by legal uncertainty. Retention of title clauses as a legal doctrine has subsequently become overstrained, in which the legal outcomes become less and less plausible. This area of law is riddled with confusion as the court's 'tend to run afoul of the legal theory upon which a simple retention of title clause is based.'[9] As a result, the use of retention of title clauses has been compromised and commercial transactions hindered.[10] This is of great detriment to those involved in the commercial field, as it is clear that the underlying objective of retention of title clauses in offering effective commercial security in times of economic hardship is impeded.[11] Thus, the central themes under consideration are the extent to which legal uncertainty hinders retention of title clauses from achieving their functional objectives of mitigating sellers' risk.

[7] Any reference to the term 'English', pertains to the law of England and Wales.
[8] L Sealy "Retention of Title- The Quick and the Dead" (1997) 56(1) *The Cambridge Law Journal,* 28-30, at 28.
[9] R Johnson "A Uniform Solution to Common Law Confusion: Retention of Title Under English and U.S. Law" (1994) 12 *International Tax & Business Law,* 99-129, at 106.
[10] *ibid* at 99.
[11] S Worthington, *Proprietary Interests in Commercial Transactions,* Oxford: Clarendon Press, 1996, at 7.

The law in this area was once accurately described as 'presently a maze if not a minefield'[12] by Justice Staughton- a depiction which holds weight and acute significance in the twenty-first century. Almost forty years later, the sentiment is still accurate to describe the way the law deals with retention of title claims. Recent legal outcomes have caused unprecedented uncertainty and detrimental implications for the functional objectives of the retention of title clause, which has undoubtedly contributed to this minefield area of law. The accuracy of this area of law as a minefield is apt for several reasons: first, it relates to the concept of a legal minefield which denotes that a subject is significantly complicated and presents several hidden problems and dangers.[13] The foreseen and unforeseen problematic aspects of retention of title clauses will be highlighted throughout the course of this thesis, to evidence that such clauses are hindered by legal uncertainty.

Secondly, the depiction of a minefield is an accurate representation of the pitfalls of retention of title clauses, where suppliers must tread carefully when seeking to use such clauses and be readily prepared to be set back by unexpected drawbacks and uncommercial implications. As will be discussed, there are ever increasing situations where retention of title clauses are struck down by the courts and this is synonymous to the mine exploding and thus bringing an end to the use of the retention of title clause within that particular situation.

Lastly, the term minefield accurately denotes the vast and all-encompassing areas of law which covers the scope of retention of title clauses, a remit which extends far beyond merely the law of sales. As such the term minefield reflects the intertwining and technical connection between retention of title clauses and a wide range of legal crossroads. Accordingly, an exploration of the legal minefield of retention of title clauses conveys the principal aims of this thesis and conveys the broad focus of this research enquiry.

1.1 The aims of the research and original contribution

The core aim of this thesis is the exploration of how the law governing retention of title clauses undermines the overall conceptual functionality of this commercial mechanism. It is evident that the inconsistent approach of dealing with retention of title clauses across a variety of different legal

[12] *Hendy Lennox Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R, 485 as per Justice Staughton at [491].
[13] See the definition of a legal minefield in the Cambridge University Dictionary, available at https://dictionary.cambridge.org/dictionary/english/minefield Accessed 06/07/20.

disciplines has had a detrimental and profound impact on the clauses' overall utility and effectiveness within the business market. This area of law is consistently met with legal uncertainty and recent judicial decisions have exacerbated this issue tenfold by producing outcomes which are deemed contradictory, uncommercial and at times, completely illogical. These controversial implications have contributed significantly to the minefield of this area of law. Thus, the aim of this thesis is to highlight the different ways in which the functionality of retention of title clauses are commercially hindered, through the exploration of how such clauses operate in practice, and a critical evaluation of the clauses legal framework which arguably impedes their viability.

An increased understanding of the law governing retention of title clause is thus necessitated and the thesis builds upon the existing qualitative material within the commercial legal field to achieve this objective. The original contribution of the thesis is made by a three-part claim. First, the originality of this research emanates from taking a holistic and functional approach to retention of title clauses, through exploring the clauses position within a variety of different legal disciplines including evaluating the law of sales, property law, the law of agency, corporate insolvency, company charges and contractual interpretation. Most existing scholarship on retention of title clauses tends to focus on one legal area exclusively[14] or provides a simplified overview specifically tailored for the intended audience of businessmen, accountants, and legal advisors.[15] Although it is acknowledged that there is literature addressing how the clauses are individually dealt with per se, such as how the clauses are dealt with under the law of sales etc, an evaluation of the broader scope in which retention of title clauses operate is needed. Thus, this research intends to contribute to the existing scholarship on retention of title clauses by providing a more holistic, all-encompassing, and comprehensive legal and critical analysis, covering the doctrines depth and breadth within a range of legal perspectives and disciplines. Providing a detailed and practical discussion on the law in this complicated legal minefield merits detailed consideration.

Secondly, this thesis will provide an updated insight on recent title jurisprudence and the economic and practical implications for retention of title clauses within the commercial sector. The overarching thread to the second claim of originality stems from the thesis providing a sole, in-depth qualitative analysis on the English approach to retention of title clauses, without offering comparative insight into how other jurisdictions deal with similar provisions of title retention. An exclusive analysis to the

[14] However, see generally, G McCormack, *Reservation of Title,* 2nd Ed, London: Sweet & Maxwell, 1995.
[15] See J Parris, *Retention of Title on the Sale of Goods,* London: Granada Publishing, 1982; S Wheeler, *Reservation of Title Clauses: Impact and Implications*, Oxford: Clarendon Press, 1991.

English approach to retention of title clauses of this depth has not been prevalent for some decades[16], and as such, the second claim boasts two elements: confined focus and a modern outlook on retention of title clauses. Accordingly, sole focus will be given to assessing the present position of English law with reference to recent cases and the practical and economic implications for retention of title clauses. Recent cases have fundamentally changed the way in which some retention of title clauses are interpreted and thus, a more recent analysis on the cases and implications for this area of law is warranted. It should be noted at the outset that an international perspective on retention of title clauses is beyond the scope of this thesis and will not be explored in detail, but some comments may be made in passing to inform the discussion. The literature exploring how retention of title clauses are treated internationally is extensive and many studies have discussed the international framework of the clauses and the formal establishing requirements which tends to differ greatly from jurisdiction to jurisdiction.[17] As such, the scope of this thesis will be refined to the English approach and how recent judicial outcomes have had a profound and detrimental impact on the conceptual functionality of the clauses. An exclusive and recent analysis on the many legal hindrances preventing sellers from relying on their retention of title clauses will thus be presented.

Thirdly, the thesis will intend to contribute to the limited research on retention of title clauses and insolvency proceedings and company administrations, more specifically the impact of the statutory moratorium, an area of law which remains underexplored in the context of retention of title clauses. The literature on the interconnection between the statutory moratorium and retention of title clauses is sparse[18], however the subject raises important questions in relation to the overall effectiveness of the clauses as a method used to provide sufficient protection to sellers/ suppliers in the event of a buyers' insolvency or administration. It is hoped that by exploring present insolvency principles and procedures and the corresponding practical impact on the clauses, such research will highlight the complications that exist in this area of law and the need to provide greater clarity.

To provide a broad summary, the central themes under consideration are the extent to which retention of title clauses are conceptually hindered by legal uncertainty and to highlight the general

[16] For example, J Parris, *Retention of Title on the Sale of Goods,* London: Granada Publishing, 1982; S Wheeler, *Reservation of Title Clauses: Impact and Implications*, Oxford: Clarendon Press, 1991; and G McCormack, *Reservation of Title,* 2nd Ed, London: Sweet & Maxwell, 1995.
[17] See I Davies, *Retention of Title Clauses in Sale of Goods Contracts in Europe,* Oxon: Routledge, 2017; G McCormack, *Secured Credit under English and American Law,* Cambridge: Cambridge University Press, 2004.
[18] Although corporate insolvency law is a saturated market, the research focusing on retention of title clause is usually confined in its scope. For corporate insolvency law, see further: R Goode, *Principles of Corporate Insolvency Law,* 4th Ed, London: Sweet & Maxwell, 2011; V Finch, *Corporate Insolvency Law: Perspectives and Principles,* 3rd Ed, Cambridge: Cambridge University Press, 2017.

disconnect between recent judicial decisions on retention of title clauses and the implications that the decisions have on their functionality and effectiveness as a method of providing security. The legal uncertainties exposed throughout the course of this thesis support the notion that the law relating to retention of title clauses remains a legal minefield. As the aims and original contribution have thus been outlined, it is now necessary to set out the methodology used in this research enquiry.

1.2 Methodology

This thesis has employed different methods of conducting legal research, with the thesis substantially adopting the doctrinal research approach, otherwise referred to as the 'black-letter law' approach.[19] The doctrinal approach focuses heavily on the analysis of statutes and judicial decisions and primarily involves the analysis of primary and secondary sources of law. Accordingly, the research process is 'used to identify, analyse and synthesise the content of the law.'[20] In the context of this thesis, the primary sources considered are the relevant statutes and case law on retention of title clauses, which span across the broad range of legal disciplines where retention of title clauses are prevalent in operation. Adopting a doctrinal approach from the onset, ensures that the interpretation of the legal standpoint on retention of title clauses can be reached, thus facilitating the process of investigating the appropriateness of the current legal position on retention of title clauses. Deriving principles from decided cases in the search for coherency and cohesion is intrinsically important for twofold reasons: firstly, it places the research firmly within the scope of doctrinal research and secondly, it is essential for answering this specific research enquiry.

The doctrinal methodology has been referred to as 'legal puzzle solving', a process which critically analyses existing literature to inform the known body of law, with the resulting aim of achieving pragmatic solutions.[21] By undertaking a doctrinal approach, the aim is to involve the use of problem-solving skills, legal reasoning and existing judicial interpretation to the analysis of case law decisions. The following quote summarises the challenges ahead of applying the doctrinal approach:
'Only rarely will there be a rule that directly and unambiguously determines the outcome of the problem presented. Seldom will the applicable black letter rule (precedent) have been determined in

[19] M McConville and W Chui (eds), *Research Methods for Law,* Edinburgh: Edinburgh University Press, 2007, at 1.
[20] T Hutchinson "Doctrinal Research: Researching the Jury" in D Watkins and M Burton (eds) *Research Methods in Law,* Abingdon: Routledge, 2013, at 9.
[21] *ibid* at 12.

a case with identical facts and circumstances near in time to the problem under consideration. Seldom will legislation or regulations unambiguously determine the outcome of the problems which arise.'[22] Thus, conducting a systematic exposition of current legal rules is paramount for employing a doctrinal approach but such a process is not without its challenges. The adoption of the doctrinal approach is particularly apt for this research enquiry as there is an unwieldy mass of case law decisions in the context of retention of title clauses. As such the doctrinal approach is an appropriate method to evaluate the legal rules and case law decisions discussed throughout the course of this thesis. As analysing case law decisions will be at the forefront of this research enquiry, more focus and detailed attention will be given to the factual background, description, and interpretation of case law. The descriptive approach to the factual content of the cases will be supplemented by an explorative narrative and critique to ensure a comprehensive critical evaluation. Accordingly, engagement with the doctrinal approach is thus necessitated to gain a deeper understanding of the context of this research.

Furthermore, aspects of this research require the adoption of the non-doctrinal approach, which focuses on identifying current problems with the law, with the broader focus of facilitating a wider understanding of the legal concepts within the contextual background in which they operate. Accordingly, the non-doctrinal approach represents 'a new approach of studying law in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and humanities.'[23] The adoption of the non-doctrinal approach is intentional to supplement some of the fundamental weaknesses of merely adopting a pure doctrinal analysis, which has been heavily criticised for its narrow scope and application.[24] The doctrinal approach has been criticised for its isolated approach to understanding the law, whereby commentators have discredited the pure doctrinal analysis for its 'intellectually rigid, inflexible and inward-looking approach.'[25] As such, adopting a pure doctrinal analysis is to confine the analysis so narrowly as to not be concerned with the world outside the law.[26] Consequently, the social, political, economic, and moral perspectives of law are not examined under a pure doctrinal analysis. Accordingly, to avoid isolating the law from its context, a non-doctrinal analysis is also utilised to realise the aim of this research project.

[22] W Hofheinz "Legal Analysis" as quoted in D Watkins and M Burton (eds) *Research Methods in Law,* Abingdon: Routledge, 2013, at 13.
[23] M McConville and W Chui (eds), *Research Methods for Law, op cit* fn 19 at 14.
[24] See, T Hutchinson "Doctrinal Research: Researching the Jury", *op cit* fn 20 at 14.
[25] D Vick "Interdisciplinary and the Discipline of Law" (2004) 31(2) *Journal of Law and Society,* 163-193, at 164.
[26] M McConville and W Chui (eds), *Research Methods for Law, op cit* fn 19 at 1.

The variety of secondary sources consulted, ranging from journal articles, governmental reports, policy documents, textbooks, and practitioners' books, places this research within the scope of conducting socio-legal research. Socio-legal research is an appropriate description for the research conducted throughout this thesis, as the research focuses on an exploration of the law in context, specifically analysing how retention of title clauses operate with the present business market and how the clauses are hindered from achieving their functional objectives. A qualitative approach to the analysis of documents will be applied in this thesis, rather than a quantitative numerical approach.[27] Adopting a qualitative socio-legal approach, facilitates the process of gaining a deeper understanding of the topic in question and subsequently, aids with the objective of this research enquiry which is primarily concerned with the interpretation of different legal texts. The advantage of employing a socio-legal approach and relying on a variety of secondary sources, is that it provides contextual knowledge and allows the research to build upon existing literature in the field, which arguably is at the forefront of any research enquiries.

Another informative source which again facilitates the exploration of law in context, is relying on the secondary analysis of official statistics. This is of importance when looking at the insolvency context of retention of title clauses, where the official statistics can provide significant insight into the market in which retention of title clause operate. It can be argued that such an approach leans towards taking an economic analysis of the law[28], which will be particularly useful for supporting the wider discussions on the current insolvency framework. In this context, it can be said that a partial economic analysis[29] will be followed to investigate a set of rules pertinent to the insolvency framework. To this end, making subtle economic inferences, avoids some of the main criticisms of employing a pure economic analysis, which centre on the interpretation of law itself.[30] Consequently, economic inferences will be alluded

[27] Quantitative/ empirical research relies on numerical data. There are two principal reasons behind adopting a qualitative research rather than a quantitative approach to this research enquiry. Firstly, an empirical study on retention of title clauses has already been observed with the seminal work of Wheeler. See further, S Wheeler, *Reservation of Title Clauses: Impact and Implications*, Oxford: Clarendon Press, 1991. Secondly, quantitative data on the impact of retention of title clauses is scarce as retention of title clauses do not require any form of formal registration. It is acknowledged than an academic enquiry is a continuous research process and thus, it is hoped that this thesis lends itself as a platform for assisting the author with future research projects on this underexplored area of quantitative research.

[28] Posner brought the economic analysis of the law to the forefront of legal scholarship. See further, R Posner, *Economic Analysis of Law,* 8th Ed, New York: Aspen Publishers, 2011.

[29] Although some economic inferences will be made in the context of retention of title clauses, such deductions are made organically and do not rely on the seminal principles associated with the economic analysis of law concerned with economic theory. Accordingly, the scholarship of economic analysis of law does not accurately represent the methodology employed in this thesis, which primarily adopts the doctrinal approach.

[30] Economic analysts of law have been criticised widely for claiming that the evaluation of legal rules ought to be efficient and as such, a common criticism of the economic analysis of law relates to its focus on efficiency of the nature of law itself. See generally, S Shavell "A note on the efficiency v distributional equity in legal

to in the context of the insolvency framework to inform the main legal evaluation. However, employing a doctrinal approach combined with a socio-legal approach appropriately represents the methodology of this research enquiry. Accordingly, simultaneously adopting different but complimentary[31] methodologies to examine a legal issue will facilitate a more comprehensive analysis of retention of title clauses.

Evidently, this research has benefited from adopting a combination of different methodologies, primarily employing the doctrinal research approach as a starting point. To engage fully with the research objective and the different legal disciplines informing this research enquiry, a breadth of sources have been considered. As the research methodology has now been outlined, it is necessary to outline the structural content of this thesis.

1.3 Structure of the thesis and outline of chapters

The remaining parts of Chapter One will seek to introduce retention of title clauses and explain the general operation of the law as well as examining the clauses apparent utility within the commercial sector. This will be achieved by analysing the legislative basis for retention of title clauses, the inherent restrictions on the clauses usefulness, the motivation for using the clauses and other associated legal benefits, all of which seek to highlight the importance of retention of title clauses as an advantageous commercial mechanism. The discussion on the legal benefits associated with retention of title clause is necessary as it seeks to lay the foundation for the later analysis by outlining the necessary content and context from which to recognise retention of title clauses functional objectives. Accordingly, this section contains a discussion of fundamental importance to the rest of the thesis, by outlining the main functional objectives of retention of title clauses as a legal device. This section will provide the necessary background information on the general legal position of retention of title clauses under English law, and emphasis will be given to the key functions of the clauses as a quasi-security device.

rulemaking: Should distributional equity matter given optimal income taxation?" (1981) *American Economic Review,* 414-418; L Kaplow and S Shavell "Why the legal system is less efficient than the income tax in redistributing income" (1994) 23 *Journal of Legal Studies,* 667-681.

[31] It is widely recognised that the socio-legal approach is complimentary to doctrinal research as both methodologies can be used simultaneously to gain a deeper understanding of the legal topic in question. See further, F Cownie and A Bradney "Socio-legal Studies: A Challenge to the Doctrinal Approach" in D Watkins and M Burton (eds) *Research Methods in Law,* Abingdon: Routledge, 2013, at 47.

Chapter Two continues the previous discussion on legal benefits of retention of title clauses, with a refined focus on the super-priority status afforded to retention of title claimants. Arguably, the priority afforded to retention of title claimants during insolvency proceedings is one of the most important functions of retention of title clauses as it accords the seller with preferential treatment in the event of an insolvency. However, as will be examined, this bestowed legal benefit also has the greatest impact on third parties during the insolvency proceedings. Accordingly, Chapter Two investigates the circumvention of the *pari passu* principle by retention of title clauses and considers the importance ascribed to the super-priority status. It explores the reasons why English law permits the recognition of security interests and quasi-security devices (in which retention of title clauses fall) and whether there are valid justifications for allowing immunity for retention of title claimants in insolvency proceedings. In achieving this aim, an exploration of the main arguments and theories for recognising quasi-security devices will be conducted. Correspondingly, this chapter will examine the main rationales behind allowing retention of title clauses to bypass the current insolvency framework, to the detriment of other involved parties, most notably unsecured creditors. The discussion in this chapter will contribute to answering the central research question of this thesis by providing the catalyst for analysing whether retention of title clauses are thwarted from achieving their functional objectives.

Central to the analysis of Chapter Three will be an evaluation of the clauses objective of retaining legal ownership to the goods supplied. This section is intended to be a progressive examination of the issues pertinent to retention of title clauses, commencing with the difficulties of terminological and definitional accuracy found within the Sale of Goods Act 1979. Accordingly, Chapter Three seeks to deal with the first of the substantive challenges to the clauses by investigating the conceptual issues with the terms: 'title', 'ownership' and 'property', which are fundamentally important for the underlying operation and purpose of retention of title clauses. The arguments in this chapter will highlight that the law relating to retention of title clauses is undermined by terminological uncertainty, lack of definitions by the legislative instrument and nuances in both the understanding and application of key concepts. The analysis in this chapter relates directly to the central research enquiry as it evaluates the flexible scope of the Sale of Goods Act 1979 and the corollary effect of legal uncertainty, which has detrimental implications for the functional utility of retention of title clauses. As will be explored throughout this chapter, the elusive nature of these terms significantly contributes to the legal uncertainty and the minefield of issues hindering retention of title clauses from achieving their functional objectives.

Chapter Four seeks to demonstrate how the interaction between retention of title clauses and registrable charges has invariably prevented the clauses from operating effectively. Central to this discussion will be the analysis of the courts' general reluctance to enforce certain types of retention of title clauses and the corollary implications of the clauses being construed as registrable charges as per the Companies Act 2006. Accordingly, Chapter Four will extend the discussion on how retention of title clauses are impeded from achieving their functional objectives by identifying the challenges of retention of title clauses being construed as registrable charges and the corresponding nuances in the interpretation and application of retention of title clauses by the courts. In the instance, where a retention of title clause is construed by the courts as creating a registrable charge, it will no longer be possible for a seller to maintain title to the goods and subsequently, this chapters explores the complicated dividing line between retention of title clauses and company charges, which both perform similar security functions. In seeking to illustrate the thin dividing line between both legal mechanisms, Chapter Four is divided into two parts; with the former part of this chapter analysing the regime of company charge registration and the latter half of this chapter focusing on the various legal positions based on the different types of retention of title clauses. The former part of the discussion will be pivotal as it explains the rationales for and against the requirement of registration, a discussion which will bear significance for the later discussion raised in Chapter Seven when discussing potential reform measures. Accordingly, Chapter Four will seek to demonstrate that one of the most common deterrents to the clauses achieving their functional objectives, is the tendency of the courts to interfere with the contractual intention of the parties and to construe the agreement as conferring a security interest.

Chapter Five will deal directly with the substantive issues associated with the cursory construction of retention of title clauses as either contracts of agency or *sui generis* contracts and the detrimental implications on the overall functionality of retention of title clauses. Thus, the aim of Chapter Five is to highlight areas of legal uncertainty, inconsistency and unpredictability arising out of three complicated retention of title cases. The analysis in this chapter relates directly to the central research question of this thesis as it examines how these three cases undermine the effectiveness and functional utility of retention of title clauses. Accordingly, the essence of the analysis will be concerned with exposing the difficulties of categorising retention of title clauses as contracts of agency or *sui generis* contracts and the corresponding implications of creating significant legal uncertainty. Thus, the overarching aim of this chapter is to critique three cases which have arguably destabilised the legal position of retention of title clauses by producing complicated and detrimental implications for those seeking to rely on retention of title clauses. The discussion will also seek to demonstrate the courts'

troubling tendency of disregarding the intention of the parties and opting for weak rationalisation of legal rules, all of which significantly contribute to the exiting minefield of issues pertaining to retention of title clauses under the current legal regime.

Chapter Six evaluates how retention of title clauses are negatively impacted by insolvency proceedings. The discussion in this chapter will focus intently on the potential barriers on the use of retention of title clauses caused by the statutory moratorium. Emphasis will also be given to how claims involving retention of title clauses are hindered by the wording of the legislative instruments, and how retention of title claimants are subjected to delays and administrative burdens. The arguments put forward during this chapter all seek to evidence how the clauses are impeded from fulfilling their functional objectives of providing a convenient mechanism which affords seller priority during the insolvency process. Through consulting these issues, Chapter Six will discuss the notable hindrances caused by the statutory moratorium during the process of administration, which imposes significant limitations on the enforcement of retention of title clauses. Subsequently, an analysis of the reactive approach taken by the courts will be conducted and this chapter will demonstrate how such an approach results in a lack of clarity and further inconsistency from a judicial standpoint. This chapter will also explore the corresponding issues of how recent judicial decisions have limited the ways claimants can effectively use retention of title clauses as a defensive mechanism during insolvency proceedings. Accordingly, this chapter directly deals with answering the main research enquiry by illustrating the many pitfalls facing retention of title claimants when seeking to exercise their title retention claims, precipitated by both the statutory moratorium and the broader insolvency framework.

The final chapter is devoted to a discussion offering possible solutions to some of the most fundamental weaknesses of the current law pertaining to retention of title clauses as identified in earlier chapters. Accordingly, a reanalysis of the legal position will be put forward, focussing specifically on the viability of any future reform initiatives and any potential difficulties associated with reforming this area of law. Chapter Seven will thus conclude the substantive debate of this thesis by suggesting three potential solutions which aim to address the most significant issues currently obstructing the functional objectives of retention of title clauses. This chapter provides a re-examination of the initial proposition that retention of title clauses as a legal mechanism are obstructed from achieving their functional objectives by significant legal uncertainty and a general reluctance observed by the courts to enforce claims involving retention of title clauses. The discussion will highlight that the piecemeal approach adopted by the courts has led to an unsatisfactory

development of the law and that the law pertaining to retention of title clauses can still be accurately described as a legal minefield.

1.4 An overview of retention of title clauses

1.4.1 An explanation of retention of title clauses

A retention of title clause enables the seller to retain ownership of goods, until the purchase price has been paid in full by the buyer.[32] As stipulated by McCormack, 'a reservation of title clause is a clause in an agreement whereby the party who is transferring property under that agreement seeks to reserve itself the ownership of that property until certain specified conditions have been met.'[33] In effect, the seller may reserve the title of the goods, despite the goods being in the physical possession of the buyer, meaning that the ownership of the goods, does not pass to the buyer until the conditions stipulated by the seller have been fulfilled.[34] In most circumstances, the condition incorporated within the retention of title clauses specifies that payment must be fulfilled before ownership can be transferred to the buyer. As such, all goods supplied will belong to the seller, until the buyer has fulfilled payment by settling all invoices and any financial obligations. Retention of title clauses claims can only be brought by companies, individuals, sellers who have supplied goods to another and have incorporated the clause into their contractual agreements. Due to the nature of the business market, its highly uncommon for goods to remain in their original state throughout the entire credit period and thus, the possibility of goods being manufactured, mixed or even resold to sub-buyers is highly likely. Accordingly, different types of retention of title clauses are drafted to accommodate such varieties.

Five different types of retention of title clauses have been established by courts and legal practitioners: simple, current account, extended, prolonged and aggregation clauses. The first type is simple clauses where the seller retains ownership in the goods until the full purchase price has been paid. The simple clause can be traced back as far as 1895 whereby Lord Watson pronounced 'the property should not become vested in the purchaser until the last farthing of the price was paid.'[35]

[32] L Sealy and R Hooley, *Commercial Law- Texts, Cases and Materials,* 4th Ed, Oxford: Oxford University Press, 2009, at 452.
[33] G McCormack, *Reservation of Title,* 2nd Ed, London: Sweet & Maxwell, 1995, at 1.
[34] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 8.
[35] *Alexander Knox McEntire v Crossley Bros* [1895] A.C. 457 HL as per Lord Watson at [468].

The second type is current account clause[36], where ownership of good supplied is retained by the seller until all debts and obligations owed by the buyer to the seller have been paid. The third variety is the extended clause[37] which has a broader application that its predecessors, in which the seller retains ownership of the goods against the buyer and any sub-buyer, until the full purchase price of the goods has been paid or until all debts owed to the seller have been met by the buyer.[38] The fourth type is the prolonged clause,[39] where ownership of the goods supplied is retained until the full purchase price of the goods has been paid or until all debts owed by the buyer are met, but in the instance where the goods are resold to a sub-buyer, then the seller acquires ownership of the proceeds of sale generated from the supplied goods. This is achieved through the use of tracing or alternatively with a prolonged clause, it is possible for a seller to acquire the right to sue the sub-buyer for such proceeds of sale. The most famous instance in which a prolonged clause was recognised was in the *Romalpa* case. The final variety is the aggregation clause[40], whereby the seller will retain ownership in the good supplied, but, if the goods are manufactured or mixed into some other property, then the seller will acquire 'ownership of the resulting property or of a proportionate part of it equal to the contribution made to the manufacturing process by the original goods.'[41] It is possible for sellers to use several types of retention of title clauses in combination, which adds to the overall convenience of the clauses. In addition, it is commonplace for sellers to include retention of title clauses within their standard terms in tandem with further contractual provisions of varying complexity.[42] Typical provisions include the buyer's duty to store the goods separately as to ensure that the supplied goods always remain identifiable and distinguishable from the buyer's own goods. Additionally provisions deal with matters such as allowing the buyer to resell the goods, terms purporting to keeping any proceeds of sale, licences permitting the buyer to use or consume the goods in the ordinary course of business and so forth. All of which highlight the utility of incorporating retention of title clauses as a standard term in contractual agreements.

[36] Also referred to as 'all monies clause' and 'all-liabilities clause'.
[37] Also known as 'continuing clause'.
[38] The extended clause is not frequently found in England and Wales due to two fundamental conceptual problems. Firstly, the doctrine of privity of contract prevents a person who is not a direct party to the contract from having contractual obligations imposed upon him. In the context of retention of title clauses, since sub-byers are not parties to the original contract of sale, sub-buyers are not bound by such terms. Secondly, the operation of section 25 of the Sale of Goods Act 1979 allows a sub-buyer who knows nothing of the retention of title clause to receive good title to the goods. See further, J Parris, *Retention of Title on the Sale of Goods,* London: Granada Publishing, 1982, 27-28. See generally *Forsythe International (UK) Ltd v Silver Shipping Co. Ltd* [1993] 2 Lloyd's Rep 268; *Re Highway Foods* [1995] 1 BCLC 209.
[39] Otherwise known as the 'tracing clause'.
[40] Otherwise known as 'enlarged clause'.
[41] G McCormack, *Reservation of Title, op cit* fn 33 at 2.
[42] D Fox, R Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials,* Oxford: Oxford University Press, 2020 at 468.

Therefore, a contract which incorporates a retention of title clause is considered essential for a seller as it provides a method of guaranteeing payment. It has been purported that retention of title clauses are 'an invaluable tool for the modern businessman, for its utility as a cheap method of granting credit'[43] and as an 'economic lifetime in times of recession.'[44] Retention of title clauses essentially create a security interest over the goods in question as a means of securing the seller's claim to the price of the goods. However, the benefits associated with retention of title clauses are not merely limited to providing security for payment of the purchase price as the purpose of the clauses extends much further. This was emphasised by Oliver LJ in *Clough Mill v Martin:*[45]

'I question the correctness of the assumption that the *whole* purpose of the clause is to give the plaintiff security for the payment of the purchase price. No doubt that is a part, and an important part, of the purpose of the clause, but put in more general terms its purpose is to protect the plaintiff from the insolvency of the buyer in circumstances where the price remains unpaid.'[46]

In circumstances such as a buyer's insolvency, in which the buyer cannot pay for the goods, a pre-incorporated retention of title clause has the potential to afford the seller better protection compared to the position of an unsecured creditor. Within a competitive market, retention of title clauses are hugely appealing to sellers/ suppliers, as the protection offered allows the goods to be seized and reverted back to the possession of the seller. As such, even if the goods are not in the possession of the seller, the seller will be able to lay claim to the goods themselves. Depending on the exact wording of the retention of title clause, the seller may also extend to claiming for any proceeds of sale, new products made out of the supplied goods or claim against a sub-buyer for the price of the goods in the event of the goods being resold to a subsequent purchaser.[47]

In the event of a buyer's insolvency, sellers who negotiate valid retention of title clauses are afforded higher priority over other creditors, meaning that the sellers do not enter insolvent estate. Specifically, the seller's goods cannot be used to settle the creditor's claims of insolvency. This is particularly significant because as an unsecured creditor, they 'rank after preferential creditors, mortgagees and the holders of floating charges and they receive a raw deal.'[48] Accordingly, the seller will not be left with an unsecured claim for the purchase price and will be afforded higher priority against competing

[43] W Davies "Romalpa thirty years on- still an enigma?" (2006) 4(2) *Hertfordshire Law Journal,* 2-23, at 23.
[44] J Feld "Retention of Title, Seller v Receiver" (1992) 89 *Law Society Gazette,* 8 as mentioned in W Davies "Romalpa thirty years on- still an enigma?" *op cit* fn 43.
[45] *Clough Mill Ltd v Martin* [1985] 1 W.L.R 111.
[46] *ibid* as per Oliver LJ at [122].
[47] See sections 4.4.3, 4.4.4 and 5.1.1 for a comprehensive discussion and examples of both prolonged and aggregation retention of title clauses.
[48] *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 as per Templemann LJ at [42].

claims in the event of a buyer's insolvency. Without the use of valid retention of title clauses, the priority order for the distribution of assets is deemed unfavourable towards suppliers of goods.[49] Thus, 'the conferring of immunity and priority by retention of title clauses render them a powerful weapon in the advent of insolvency.'[50] Under the protection of retention of title clauses, it is clear that seller's losses and exposure to risks of non-payment are minimised. In the event of a buyer's failure to pay the full purchase price of the goods, sellers are not left in a vulnerable position of having an unsecured claim for purchase price. Retention of title clauses are a convenient legal mechanism in commerce as the clauses are of means of ensuring that payment will be forthcoming and that the sellers will be provided with some of protection.[51] A more detailed analysis of the legal benefits of retention of title clauses will be addressed further on in this section.[52]

1.4.2 Legal background

Originally, property in goods could transfer only by delivery.[53] However, two notable exceptions developed, firstly property could be transferred by way of a deed and secondly under a contract of sale, subject to the intentions of the parties.[54] The provisions for the passing of property are found in the Sale of Goods Act 1979. As per s17 of the Act, property passes when intended to pass. Under sections 16 and 17, the goods must either be specific or ascertained for property to pass.[55] Accordingly, s17 of the Act allows parties to delay the passing of title for as long as they wish.[56] In the event of non-payment before delivery, section 39 of the Act stipulates that an unpaid seller is entitled to retain possession of the goods by way of a lien on the goods, right to re-sell or a right of stopping the goods in transit. To protect an unpaid seller against the risk of non-payment after delivery, a seller must negotiate for protection from the onset.

One method of ensuring protection is by virtue of section 19 of the Act, which provides that a seller may reserve the right of disposal of the goods until conditions set by the seller are fulfilled. Accordingly, under section 19 property to the goods does not pass to the buyer until the conditions stipulated by the seller have been fulfilled. The terminology 'reserving the right of disposal of the

[49] G Monti "The Future of Reservation of Title Clauses in the European Community" (1997) 46 *International & Comparative Law Quarterly,* 866-907, at 866.
[50] J Snead "Rationalising Retention of Title Clauses with Insolvency Law" (2004) *UCL Jurisprudence Review,* 288-304, at 289.
[51] *ibid* at 290.
[52] See section 1.6 for the discussion on the legal benefits associated with retention of title clauses.
[53] See Sale of Goods Act 1893.
[54] See *Cochrane v Moore* (1890) 25 Q.B.D. 57 as per Fry LJ at [71-73].
[55] Section 16 and 17 Sale of Goods Act 1979.
[56] D Fox, R Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials, op cit* fn 42 at 472.

goods'[57] may not be the most accurate reflection of the operation of retention of title clauses but the intention of the provision is clear- a seller may retain title to the goods until certain conditions are met by the buyer.[58] Accordingly, section 19 provides the embodiment of the contractual principle as parties are free to contract as they will, subject only to the vitiating factors including fraud and deceit.[59]

The combination of both section 17 and 19 of the Sale of Goods Act, provides the legislative basis for retention of title clauses. A seller can reserve title in goods until certain conditions have been met, even though physical possession of the goods has passed to the buyer. As emphasised by Gullifer, for such reasons 'sellers have developed a powerful method of proprietary protection against counterparty credit risk by manipulating the passing of property after delivery.'[60] Retention of title clauses provides a seller with a proprietary interest in the goods, however this does not impact the buyer's right to possession, right to sell, right to consume or right to use the goods in a manufactured process. It is evident that with a valid retention of title clause, a seller's legal rights are significantly stronger. As per section 19 of the Act, the property in the goods will not pass to the buyer, until the specific conditions set by the seller have been fulfilled, offering a form of protection to the sellers by mitigating risks and losses. Accordingly, retention of title clauses are governed by the law of sales and thus, do not constitute a security interest in law, despite the clauses fulfilling the function of security. Under the remit of retention of title clauses, the buyer is merely agreeing that it will not acquire ownership to the goods until payment of the price, rather than granting rights over its own assets and as such does not constitute a security interest in law.[61] The English legal framework can thus be described as taking a formal rather than functional approach to the characterisation of agreements.[62]

In the circumstance where a buyer resells the goods, without full payment and without the permission of the seller, the subsequent buyer will not acquire title. However, under section 25 of the Sale of Goods Act, a buyer who is in possession of the goods and who has obtained consent from the seller, can successfully transfer title to the subsequent buyer if he bought the goods in good faith and without notice of the seller's retention of title clause. For the operation of section 25, there must be delivery or transfer by way of sale, and as such it is not possible for a receiver nor a liquidator to obtain title by

[57] Section 19 of the Sale of Goods Act 1979.
[58] G McCormack, *Reservation of Title, op cit* fn 33 at 1.
[59] J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 290.
[60] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?" (2017) 133 *Law Quarterly Review,* 244-268, at 246.
[61] R Goode, *Principles of Corporate Insolvency Law,* 4th Ed, London: Sweet & Maxwell, 2011, at 6.
[62] *ibid.*

virtue of section 25.[63] Accordingly, under section 25 of the Act, a sub-buyer who knows nothing of the retention of title clauses will receive a good title. In essence, section 25 can override a retention of title clause and thus may provide a simple explanation as to why the type of extended retention of title clauses are not frequently used in England and Wales.[64] As emphasised by Parris 'the wording of section 25(1) appears to be wide enough to cover the situation where a buyer in possession with a retention of title clause in favour of the true owners, sells and delivers to a sub-purchaser.'[65] From the onset, retention of title clauses as a legal mechanism are thus hindered by virtue of section 25 of the Sale of Goods Act. A buyer may also acquire good title if the retention of title clauses allows for the possibility of resale or does not expressly restrict it. However, to reap the benefits of the clauses, they must be incorporated into a contract correctly.

1.4.3 Incorporating a retention of title clause into a contract

From the perspective of the seller, enforcing retention of title clauses is important, in order to ensure that as events unfold, retention of title claimants can claim their contractual rights and take advantage of the protection afforded. When suppliers are in the position of dealing one-off contracts with large amounts of capital, it is custom for retention of title clauses to be written and drafted as a clause within the contract. Otherwise, it is commonplace for suppliers of goods and materials to incorporate the retention of title clause within a set terms of conditions within trading documents.[66] As emphasised by McCormack, 'well-drafted clauses are hardly worth the paper they are written on if they have not been properly incorporated into the contract between the parties.'[67] Unless a retention of title clause is incorporated, the contract will be held unenforceable. The importance of incorporating clauses correctly is fundamental in the event of insolvency, as a liquidator will require written evidence of the retention of title clause.

The easiest way for a retention of title clause to be incorporated within a contract of sale is obtaining written confirmation by the buyer assenting to the terms of the contract. This is fundamental as during the preliminary stages of insolvency, a receiver will seek evidence which confirms the incorporation of the title clause and whether the insolvent party accepted such terms. Written confirmation of

[63] J Parris, *Retention of Title on the Sale of Goods,* London: Granada Publishing, 1982, at 45.
[64] Contrastingly, the extended retention of clauses are found commonly in France where the provision is known as '*reservation prolongée'* and in Germany where such provisions are referred to as *'weitergeleitet eigentumsvorbehalt'.* For an interesting discussion on why extended clauses are not commonly found in England and Wales see: J Parris, *Retention of Title on the Sale of Goods*, *op cit* fn 63 at 27-28.
[65] J Parris, *Retention of Title on the Sale of Goods, op cit* fn 63 at 45.
[66] British Exporters Association, *The BExA Guide to Retention of Title Clauses in Export Contracts,* 19 available at http://www.bexaweb.plus.com/files/rotguideaug05.pdf Accessed 19/01/17.
[67] G McCormack, *Reservation of Title, op cit* fn 33 at 63.

retention of title clauses has the potential to speed up the insolvency process by dismissing the insolvent's claim to the goods, and ultimately allowing the specified goods to be reverted to the seller. However, liquidators often challenge the validity of incorporating such clauses as reverting the goods back to the seller will reduce the available pool of assets for the creditors. As such, in practice, it is essential that retention of title clauses are drafted carefully and incorporated properly into the contract before acceptance occurs. Even though the notion of exchanging written contracts between a seller and buyer may seem a simple procedure, in practice this is rarely simple. Difficulties and issues occur due to the nature of the market in which contracts for the supply of goods are often made on a fairly ad hoc basis or involve haphazard documentation in the circumstances where there are cash flow demands which necessitate stocks to be maintained at a certain quota etc.[68]

However, in practice, difficulties arise in evidencing that retention of title clause have been properly incorporated. The case of *P4 Ltd v Unite Integrated Solutions Plc*[69] provides an important reminder that all terms should be legible and included in the contract. In this case, the terms and conditions were printed on the reverse of the documentation and it was held that none of the supply contracts had incorporated the retention of title clauses, on which the claimant sought to rely. The supplier could not establish that the terms and conditions had been sent by fax as only the face of the quotation had been received, this led to the conclusion that the supplier had not incorporated the retention of title clause, which meant that the claim based on that retention of title clause failed.[70] This serves as a stark warning for suppliers to ensure that their terms and conditions are communicated to the buyer.

It is important that the seller's contractual terms are clear and that they must be communicated to the buyer effectively. The importance of effectively communicating terms of contract and incorporating a retention of title clause properly can be exemplified by the case of *Lightning Bolt Ltd v Elite Performance Cars Ltd.*[71] In a claim of conversion, the buyer of two luxury cars was entitled to be compensated for loss suffered, when the two luxury cars were seized by the seller as it was held that title to the cars had passed to the buyer, despite the inclusion of a retention of title clause.[72] It was held that the terms purporting to retain title to the luxury cars had not been effectively communicated to or accepted by the buyer and for such reasons, the seller had no legal claim to the title of the cars. The Chancery Division of the High Court found the document in question (a letter)

[68] J Goldring, "Floating charges- the awakening" (2006) 19(5) *Insolvency Intelligence,* 68-71, at 69.
[69] *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2640.
[70] *ibid* as per Ramsey J at [92].
[71] *Lightning Bolt Ltd v Elite Performance Cars Ltd* [2011] EWHC 4075 (Ch).
[72] *ibid.*

was not apt to create a security or retention of title clause and thus, title had effectively passed to the buyer as the terms had not been effectively communicated nor accepted by the buyer. Accordingly, the terms and conditions 'had no impact on the legal position as to title to the cars.'[73] For such reasons, the claimant's claim in conversion and trespass to goods was allowed as it was found that the defendant (seller) was not the legal owner and was not entitled to remove the two luxury cars from the buyers. Accordingly, including a provision for a retention of title clause on a letter as indicated above or on the reverse of delivery notes or purchase receipts will render such clauses ineffective.

In accordance with general contract law principles, another way of incorporating a retention of title clause is by giving reasonably sufficient notice of the terms, or incorporation by consistent course of dealing. Reasonably sufficient notice of the retention of title clause extends to whether or not the contractual document has been signed, the onus is on the party seeking to rely on the retention of title clause to show that the other party was given reasonably sufficient notice of the existence of the clause.[74] The ways in which sellers can successfully contend that their retention of title clause has been incorporated, has been summarised by Boreham J in *John Snow & Co Ltd v DBG Woodcroft & Co Ltd.*[75] In this case, the plaintiffs claimed that their terms included a retention of title clause, which entitled the plaintiffs to repossess timber as the clause purported to reserve property in the goods until the defendant company had discharged all of its indebtedness. The defendant company argued that the terms of sale did not contain a retention of title clause. It was found that the plaintiffs had successfully established that their retention of title clause had become a term of their various contracts. Accordingly, as per Boreham J, incorporation may be established by the following:

> '(1) If the party sought to be bound was, at the material time, unaware of any writing or printing on the document relied upon, he will not be taken to have notice of the term in question and thus will not be bound by it,
>
> (2) If the party sought to be bound was aware, at the material time, that the document relied upon contained or referred to terms and conditions he will be taken to have notice of the term in question and will be bound by it.
>
> (3) If the party sought to be bound, knew that the document relied upon contained writing or printing, but was unaware that it contained terms or conditions, he will be taken to have notice of and thus be bound by the term in question, only if the party seeking to bind him has done all that was reasonably sufficient to bring the terms and conditions to his notice. Whether what was done was reasonably sufficient for that purpose is to be judged by all the

[73] *ibid* as per His Honour Judge Barker at [29].
[74] See further *John Snow and Co Ltd v D.B.G Woodcroft and Co Ltd* [1985] BCLC 54.
[75] *ibid.*

circumstances of the case, including the situations of the parties, the layout and contents of the documents relied upon and whether or not the term in question is unusually wide or unusually stringent. Some clauses may be so unusual as to require attention drawn to them in the most explicit manner.'[76]

In this case, the existence of the retention of title clause had been brought to the attention of the defendant company, and thus it formed part of the contract and could be relied upon to repossess the timber.

In the absence of written conformation at the outset governing the contractual relationship between supplier and buyer, it would be necessary to argue that there was a course of dealing between the parties. Incorporation by course of dealing would require the supplier to evidence that the retention of title clause was brought to the attention of the buyer and thus had been incorporated into the contractual agreements. However, a case which refuted the assertion that a retention of title clause was incorporated by course of dealing was *Wavin Nederland v Excomb.*[77] In this case, Leggatt J expressed the underlying importance of considering whether the notion of relying on previous standard terms and conditions incorporated consistently between the parties is legitimate.[78] A retention of title clause will not be implied into a contract in the situations where the clauses do not expressly mention the title retaining provision.[79] In addition, a supplier will not be able to rely on several invoices upon which retention of title terms are included and claim that the clause has been incorporated by a course of dealing. As invoices are post-contractual documents, it is difficult to argue that the retention of title terms had been expressly incorporated into the contracts between the two parties.[80] Although solely relying on various invoices may prove difficult for arguing that the clause had been incorporated by course of dealing, it is not an impossible eventuality as can be seen in *Circle Freight International v Medeast Gulf Exports Ltd.*[81] In this case, the Court of Appeal held that the proper approach was to consider whether in all circumstances, had the seller taken reasonable steps to notify the buyer of its intention to trade on the terms relied upon, in which case invoices may prove sufficient evidence.[82] However, there are instances where retention of title clauses have been incorporated by course of dealing including the infamous case of *Romalpa.* In that case the plaintiffs, Aluminium Industrie Vaassen (AIV) alleged that the retention of title clause was an express or implied

[76] *John Snow and Co Ltd v D.B.G Woodcroft and Co Ltd*, *op cit* fn 74 as per Boreham J at [58].
[77] *Wavin Nederland v Excomb* [1983] N.L.J 937.
[78] *ibid* as per Leggatt J.
[79] G McCormack, *Reservation of Title, op cit* fn 33 at 65.
[80] J Goldring, "Floating charges- the awakening", *op cit* fn 68 at 69.
[81] *Circle Freight International v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427.
[82] J Goldring, "Floating charges- the awakening", *op cit* fn 68 at 70.

term of the contract with Romalpa Ltd. Parris was of the opinion that 'had the transactions between AIV and Romalpa Ltd taken place between parties coming afresh to do business with no antecedent transactions between them, it is most unlikely that the vital clause 13 [the provision of retention of title] would have been held to be a term of the contract of sale.'[83]

Thus, a retention of title clause will only be effectively incorporated if the term has been brought to the attention of the party before or at the time the contract is made. As such, retention of title clauses will likely be rejected for non-incorporation, if the terms were imposed after the contract has been made.[84] However, Bradgate argues that it is possible for a retention of title clause to be imposed after the contract has been made under the provisions of the Sale of Goods Act.[85] In a contract of sale and unascertained goods, sellers are given the option of imposing a retention in the contract of sale or through appropriation, by virtue of section 19 of the Sale of Goods Act. Bradgate recognises that the imposition of a retention of title clause through appropriation may lead to a breach of contract, however appropriation may nevertheless prevent the passing of title.[86] Imposing a retention of title at the time of appropriation may be appropriate in circumstances which involve conducting a contract order by telephone, in which the buyer needs goods urgently.[87] When the contract is made over the phone, any subsequent attempts to include new terms will be ineffective. As such, imposing a retention of title clause at the time of appropriating the goods may be the only suitable option for the seller. Nevertheless, this is contentious, and it may be possible to rebut imposing a retention of title clause after the contract has been made, by implicit reference to section 17, which states property passes when intended to pass. As such, imposing a retention of title clause after the contract has been made, may be ineffective by considering the intention of the parties and section 17.[88] Relying on a course of dealing argument should not be relied upon due to the uncertainty of such a claim.

Additionally, if a seller inserts a term within the contract of sale, which includes a retention of title clause and the buyer purported to accept the terms of the offer but excludes the retention of title clause, this is deemed a counter offer as there is no unconditional acceptance of the offer.[89] In practice, this can also be difficult to prove, particularly in situations where the seller assumes his terms are agreed, but are met with new terms proposed by the buyer, which amounts to a clear rejection of

[83] J Parris, *Retention of Title on the Sale of Goods, op cit* fn 63 at 15.
[84] See *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532.
[85] See generally, J Bradgate "The Post-Contractual Reservation of Title" (1998) *Journal of Business Law,* 477-485.
[86] *ibid* at 478.
[87] *ibid* at 480.
[88] *ibid* at 482.
[89] G McCormack, *Reservation of Title, op cit* fn 33 at 73.

terms. If the seller proceeds with the contract of sale, with no further negotiations between the parties, then the terms contained in the counter offer will govern the contract, a stipulation otherwise known as 'battle of the forms'.[90] As demonstrated in *Butler Machine Tool v Ex-Cell-O Corp*[91], in which Lord Denning's emphasis of construing all communications between the parties as a whole is expressed:

'The terms and conditions of both parties are to be construed together. If they can be reconciled to give a harmonious result, all well and good. If differences are irreconcilable- so that they are all mutually contradictory- then the conflicting terms may have to be scrapped and replaced by a reasonable implication.'[92]

This methodology can be seen in more recent cases such as *Lidl UK Gmbh v Hertford Foods Ltd,*[93] which involved parties not reaching an agreement as to the applicability of either set of standard terms, and as such, the court inferred that the parties had not reached a binding agreement and accordingly the terms agreed were those expressly agreed or to be implied by law.[94] In addition, attention can be drawn to the case of *Transformers & Rectifiers Ltd v Needs Ltd*[95] which emphasises that it is the responsibility of the party seeking to incorporate their governing terms into the contract to give reasonable notice of such terms to the other party and fully inform the party that it is their intention to rely on such terms. Taking all the above into consideration and having outlined potential pitfalls with regards to incorporating retention of title terms into a contractual agreement, it is imperative that parties communicate their terms and conditions clearly and consistently. In the context of retention of title clauses, sellers of goods must be proactive from the onset in clarifying which terms govern their contract of sale. Parties seeking to rely on a retention of title clause should thus ensure that the clause in question has been effectively incorporated into the contracts of sale. To reiterate, such clauses should be clearly set out and must be brought to the attention of the other party. It is submitted by Bradgate, that a buyer will rarely be concerned with when exactly property passes to buyer as long as the buyer is in possession of the goods and is able to use the goods.[96] Therefore, following this analysis a buyer will seldom contradict the inclusion of a retention of title clause if it has been brought to the attention of the buyer before the contract is made.

[90] See further *Butler Machine Tool CO v Ex-Cell-O Corp (England) Limited* [1977] EWCA Civ 9.
[91] *ibid.*
[92] *ibid* as per Lord Denning at [104].
[93] *Lidl UK Gmbh v Herford Food Ltd & Another* [2001] EWCA Civ 938.
[94] *ibid* as per Lord Justice Chadwick at [25].
[95] *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269.
[96] J Bradgate "The Post-Contractual Reservation of Title", *op cit* fn 85 at 479.

It is evident that preparation is key for any companies intending the outcome of a retention of title clause to be successful. Accordingly, resources must be collated in order to properly enforce retention of title clauses, for example resources should include lawyers, debt collectors, haulage firms, alternative buyers and storage facilities etc.[97] Exercising suppliers' rights under a claim of title retention can be considered costly as a successful recovery of goods involves costs relating to transport, repacking, storage and legal fees. Therefore, it is considered good practice for companies to set aside contingency funds to finance an operation of this kind.

1.4.4 Inherent restrictions of usefulness

1.4.4 (a) Limitations of retention of title clauses

Whether or not a retention of title clause will be effective is wholly dependent on the nature of the business, the type of goods sold by the supplier and the wording of the clause. As discussed below, there are several variables which may impact on the functional utility of a retention of title clause. There are essentially three types of goods, where retention of title clauses are of limited use: perishable, incorporated goods and mixed goods. Therefore, a minority group of suppliers exist who as a result of the goods they are selling, cannot effectively nor logically retain title and thus, are usually subjected to the harsh insolvency costs.[98] This section analyses the restrictions of retention of title clauses, in which the instances whereby retention of title clauses are less applicable will be presented.

1.4.4 (b) Perishable goods

Retention of title clauses are considered of less practical benefit in respect of perishable goods. The term 'perishable goods' refers to goods which are highly vulnerable and deteriorate in a short amount of time. The effectiveness and utility of retention of title clauses in respect of processed goods can also be questioned, as discussed below. In circumstances where businesses are primarily involved with customers of consumables, it is evident that claims for retention of title clauses are less likely as they will be rendered ineffective, as the sellers will not be able to make use of such a clause as the goods are mostly perishable.[99] 'Goods that are consumable cannot, prima facie, be protected by such clauses as by their nature once they are supplied they cease to exist.'[100] Arguably retention of title clauses can

[97] British Exporters Association, *The BExA Guide to Retention of Title Clauses in Export Contracts,* 19 available at http://www.bexaweb.plus.com/files/rotguideaug05.pdf Accessed 19/01/17.
[98] V Finch "Security, Insolvency and Risk: Who pays the price?" (1999) 62 *The Modern Law Review,* 633-670, at 647.
[99] J Spencer "The commercial realities of reservation of title clauses" (1989) *Journal of Business Law,* 220-232, at 228.
[100] J Tribe "The morality of Romalpa clauses in corporate insolvency: a case for reform?" (2001) 17 *Insolvency Law and Practice,* 1-19, at 3.

only be effective whilst the goods still exist and thus become ineffective once the goods cease to exist.[101]

Examples include businesses who deal with fuel, livestock purposed for consumption or paint whereby retention of title clauses would be ineffective as the sellers will not be able to retrieve their goods. This matter was pinpointed by the Cork Committee: 'fuel supplied to heat furnaces or fodder supplied for livestock, disappears on consumption and paint applied to the fabric of a factory becomes attached to the realty; the supplier of credit is necessarily left with an unsecured claim in the insolvency of the customer.'[102] Arguably, the fundamental purpose of retention of title is thus not immediately logical, in situations where sellers have relinquished possession of the goods supplied which are perishable in nature. Additionally, the objective of a seller seeking to maintain certain rights in goods, can be increasingly more challenging in the fast-paced industry of supply contracts. Within the market of commodity supply contracts, goods such as petrol, coal, oils can be sold, used, consumed by several different buyers before reaching its final distant buyer, thus adding to argument that retention of title clauses are thus not immediately logical nor effective in commodity supply contracts.[103] The implications of supply contracts including retention of title terms for bunkers fuel, will be discussed at length in a forthcoming chapter.[104]

The inherent limitations of retention of title clauses and perishable goods can be demonstrated by the case of *Chaigley Farms Ltd v Crawford Kaye & Grayshire Ltd.*[105] In this case, Chaigley Farms supplied livestock consisting of beef cattle and ewes for slaughter to an abattoir, on the basis of a retention of title clause. The retention of title terms specified that the livestock would remain the property of the supplier (Chaigley Farms) until the property was paid for in full. Receivers (Crawford Kaye & Grayshire) were appointed for the abattoir and the remaining livestock was slaughtered and all the meat was sold. Chaigley Farms called the property back to enforce the retention of title clause, which provided that the livestock and carcasses remained the property of Chaigley Farms until the property was sold on to the defendants' customers. It was held that the words 'livestock' and 'goods' could only refer to live animals and thus, the terms could not be given the extended meaning of carcasses. As explained

[101] D Saidov "Sales law post-Res Cogitans" (2019) *Journal of Business Law,* 1-20, at 4.
[102] K Cork, *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 known as the "Cork Report."
[103] B Ellison, L Williams and S Fellows 'Commodities contracts and the impact of the OW Bunkers case' (2016) available at https://www.reedsmith.com/en/perspectives/2016/06/commodities-contracts-and-the-impact-of-the-ow-bun%20 Accessed 02/08/2018.
[104] For further discussion of this, see section 5.3.
[105] *Chaigley Farms Ltd v Crawford Kaye & Grayshire Ltd (t/a Leylands)* [1996] BCC 957.

by Garland J: 'there is, in my view, an inescapable difference between a live animal and a dead one.'[106] Accordingly, the livestock had lost their identity when the livestock became carcasses of meat. The judgement explained that the retention of title clause would have been effective so long as the animals were alive, however when the livestock was slaughtered, the title to the property had been extinguished.[107] This case is useful in explaining that retention of title clauses for livestock will most likely be ineffective as title would be lost on slaughter. The rigid English approach to perishable or processed goods can be contrasted with the lenient approach taken by the New Zealand courts in *Re Weddell New Zealand Ltd*[108] to perishable goods. The facts of *Re Weddell* mirror *Chaigley Farms,* in which owners of cattle had supplied livestock to an abattoir under the provision of a retention of title clause, reserving title until the full purchase price had been paid. However, in the latter case the retention of title clause was held to be effective in reserving the seller's ownership of livestock after the slaughtering and further processing.[109] As such, the seller was able to assert a retention of title clause to carcasses and meat, following the act of slaughtering livestock. The distinguishing factor of the case was that *Re Weddell* contained a retention of title clause, which was inserted into the contract by the buyer to protect themselves during the act of slaughtering and processing the meat. This distinction serves to emphasise that the wording of a retention of title clause can significantly impact the intended results. Accordingly, this retention of title clause was not incorporated into the contract to protect the seller against the risk of non-payment, but rather by the buyer to protect themselves during the course of slaughtering, this may explain the vastly different outcomes of the two cases.[110] Nevertheless, the position taken from the *Chaigley Farms* case demonstrates that when livestock is slaughtered, the seller's title to the goods will be extinguished and subsequently, title will pass from seller to buyer, rendering the retention of title clause to livestock redundant.[111]

For a more recent example of how the courts deal with retention of title clauses and goods which perish once used or consumed, the case of *PST Energy 7 Shipping LLC v O W Bunker Malta Limited*[112] can be helpful. In this case a contract for the supply of fuel bunkers included a retention of title clause, which purported to protect the supplier against the risk of non-payment, they were three main parties to the contract OW Bunkers, the physical suppliers and the shipowners. A more detailed analysis of

[106] *Chaigley Farms Ltd v Crawford Kaye & Grayshire Ltd (t/a Leylands), op cit* fn 105 as per Garland J at [963].
[107] *ibid* at [958].
[108] *Re Weddell New Zealand* (1966) 5 N.Z.B.L.C.
[109] L S Sealy "Retention of title- the quick and the dead", *op cit* fn 8 at 29.
[110] J De Lacy "Retention of title and claims against processed goods: a different approach" (1996) 13(5) *Corporate Rescue and Insolvency Journal,* 163, 1-3, at 1.
[111] J De Lacy "Retention of title and claims against processed goods" (1998) *Conveyancer and Property Lawyer,* 52-57, at 56.
[112] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited* [2016] UKSC 23.

the case and its implications is discussed in a later chapter.[113] The contract stipulated that title to the fuel bunkers would remain with the supplier until full payment was made. Despite the inclusion of a retention of title clause, the contract expressly provided that from the moment of delivery the shipowners were permitted to use the fuel bunkers for the purposes of propulsion. Accordingly, the contract permitted the shipowners to consume the fuel during the period of credit, which lead to the shipowner receiving and consuming the fuel before payment became due. OW Bunker became insolvent and the physical supplier intended to claim the price of the fuel by relying on the inclusion of the retention of title clauses within the contracts. It was held by the Supreme Court that the contracts were not 'contracts of sale' under the Sale of Goods Act 1979. The rationale for the decision was that there can only be a contract of sale if title to the goods successfully passes from supplier to a buyer. Title could not pass under these contracts, due to the type of goods supplied being fuel bunkers, which may not exist at the time of full payment. The court explained that the combination of the retention of title clause, credit period and permission to use the bunkers for propulsion purposes, implied that the parties had an understanding that title would not transfer as the bunkers were likely to be consumed before payment was due. As there was an understanding that the bunkers would be consumed before the end of the credit period, the court held that the contract was not a contract of sale but rather a *sui generis* contract. On the assumed facts of the case and specifically the wording of the retention of title clause, the owners were liable for the price under a contract *sui generis,* rather than a contract of sale.[114] The consequences of this decision meant that the retention of title clause could not be relied upon to recover the price of the fuel. This has implications for perishable goods as difficulties arise when ascertaining what constitutes a 'contract of sale' within the meaning of the Sale of Goods Act 1979 s2(1). It is clear from the above case, that title is unlikely to pass in such situations. Accordingly, it is not possible to own something that ceases to exist after consumption. The above case clarifies that in situations involving goods that can be consumed during the credit period, which also include a retention of title clause provision, this will not constitute a 'contract of sale' and as such the protection afforded under the Sales of Goods Act will not be available.

Accordingly, from the above discussion, it is heavily implied that some particular goods are inherently unsuitable for the purposes of a retention of title clause such as fresh flowers or newspapers.[115] The proceeding examples emphasise that retention of title clauses may not be practical to broader

[113] See section 5.3 for a detailed analysis on the *Bunkers* case.
[114] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [26-39].
[115] British Exporters Association, *The BExA Guide to Retention of Title Clauses in Export Contracts,* 17 available at http://www.bexaweb.plus.com/files/rotguideaug05.pdf Accessed 19/01/17.

categories of goods with limited shelf life. As fresh flowers constitute perishable goods, the retention of title clause is unlikely to be useful as the goods may perish before payment is due. Accordingly, the protection purported to suppliers via the use of an effective retention of title clause will be inadequate, due to the commercial reality of perishable goods risking a high possibility that the goods would have been used or disposed of prior to the fulfilment of the conditions imposed by the contract. To preserve rights in reclaiming perishable goods would incur unnecessary loss to both the buyer and the supplier, who would each suffer some type of economic detriment. Additionally, perishable goods tend to have a low resale value, which forms another reason why retention of title clauses are of little use for suppliers of perishable goods.

1.4.4 (c) Incorporated goods

Similarly, retention of title clauses are not useful in relation to goods that have been incorporated. The definition of incorporated goods includes examples such as building materials and products which have been integrated into buildings.[116] In such circumstances, the logistics and costs of the recovery of the goods under a retention of title clause would be unrealistic and would vastly exceed the value of the original goods. Therefore, retention of title clauses are of limited use when the costs of recovery are disproportionate to the value of the incorporated goods. Similarities can also be made where goods supplied have become affixed to the land, in which case the goods ceased to exist for the purpose of a retention of title claim once the goods have become part of the land. Affixed goods such as partitions and shelving systems are borderline and will ultimately depend on a case by case basis.[117]

This line of reasoning also applies to special purpose items such as carpets, which once fitted would be of little use for any other purpose.[118] Accordingly, bespoke goods which have been manufactured for a specific purpose, lessen the overall efficacy of retention of title clauses as such goods cannot be resold or can only incur very low costs for the impugned goods. However, it is evident that in most cases suppliers of goods will not be truly interested in retrieving the goods as the probability of depreciation through wear and tear would be high.[119] Additionally, in most circumstances retrieving the initial goods would also mean that the seller would have to source out the goods to another buyer. In these situations, the seller risks incurring higher costs than the actual worth of the original goods.

[116] J Spencer "The commercial realities of reservation of title clauses", *op cit* fn 99 at 221.
[117] J Goldring, "Floating charges- the awakening", *op cit* fn 68 at 70.
[118] J Spencer "The commercial realities of reservation of title clauses", *op cit* fn 99 at 222.
[119] J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 291.

Therefore, a supplier would be more interested in incorporating a retention of title clause which allows the recovery of the invoice price of the goods, which enables the supplier to manage his own costs and ultimately obtain profit.[120] Accordingly, '[retention of title clauses] seem to prove a strong quasi-security device for providing credit.'[121] This is particularly advantageous to suppliers and sellers who under the protection of a valid retention of title clause would be in a stronger position to obtain the monetary value of the goods.

1.4.4 (d) Mixed goods

It is increasingly common for supplied goods to be used or manufactured by the buyer to create new mixed products resulting in the integration of the supplied goods and other goods. Whether a seller can retain title in circumstances where goods have been supplied and have been subsequently mixed with other goods is disputable. For such reasons, this area has led to an influx of case law, whereby countless attempts have been made to address the issue of retention of title clauses and mixed goods. Retention of title clauses relating to mixed goods has become a contentious legal topic and problems emanate from attempting to identify the precise circumstances where goods either remain or change from their original state. The efficacy of a retention of title clause is contingent on goods remaining in their original state as to allow the seller to rely on the clause and subsequently recover any goods.[122]

However, it is apparent that the courts approach to mixed goods and retention of title clauses is twofold. Firstly, a seller with an appropriate retention of title clause will be able to retain title, provided that the original goods remain identifiable and can be removed without damage to the other goods comprising the mixed good.[123] Whether the supplied goods have lost their identify having being incorporated into a finished product is a question of fact. Secondly, if the goods lose their identity during the manufacturing process, the seller will in fact lose title of the goods.[124] For example, where flour has been supplied to a buyer, who bakes a cake using the supplied flour, the flour is no longer identifiable and thus a retention of title clause will be ineffective. Consequently, the courts attempt to distinguish effective retention of title clauses of mixed goods by ascertaining whether or not the original goods remain identifiable or not. In order for a seller to effectively enforce a retention of title clause on mixed goods, the seller must be able to demonstrate to the courts that the goods supplied have not lost their original identity whilst in the buyer's possession. Although it may appear that the

[120] *ibid.*
[121] *ibid* at 292.
[122] J De Lacy "Retention of title and claims against processed goods"*, op cit* fn 111 at 53.
[123] See *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12.
[124] See *Re Peachdart Ltd* [1984] Ch 131.

law on mixed goods or aggregation retention of title clauses is relatively settled, difficulties persist with the conceptual notion of goods losing identity. Examples include whether the goods supplied are in the exact same condition but have merely been painted or amended slightly for use, does this constitute changing the identify of the goods? It is difficult to precisely say with any certainty and as such results are difficult to predict. It has been suggested that the reversibility of the process and the value of what has been added to the goods may be regarded as relevant factors for answering the difficult question of losing the goods identity[125], however one thing is apparent that difficulties continue to perplex this problematic area of the law. The contentious matter is identifying when certain goods have lost their identity, which will vary on a case by case basis as discussed in Chapter Four.[126]

Despite the inherent limitations on retention of title clauses and the unlikelihood of retrieving goods of perishable, incorporated or mixed nature. It can be argued that the supplier of such goods may not be truly invested or concerned with regaining the supplied goods but is instead more interested in the invoice price of the goods. As such, the real intention behind suppliers relying on retention of title clauses is not restricted to the prospect of retrieving supplied goods which may deteriorate through wear and time.[127] Retrieving the goods under the retention of title clause would also necessitate suppliers finding new potential buyers for their supplied goods. Accordingly, claiming the price of the goods may be the most cost-effective solution as it would allow the sellers to offset their own costs and obtain any potential profit.[128] Thus, despite the illusory limitations of retention of title clauses, it is apparent that the clause provides seller the opportunity to gain a stronger position of obtaining credit and retrieving the price of the goods.

1.4.4 (e) Buyers in possession and third-party acquirers of goods

As aforementioned, retention of title clauses can be defeated if the buyer sells the supplied goods to a third-party purchaser who buys goods in good faith and without notice of the seller's original retention of title clause.[129] Accordingly, the discussion will now turn to consider how far in principle third party acquirers of goods sold under retention of title clauses ought to take free of such interests as provided under section 25 of the Sale of Goods Act. Despite some judicial ambiguity as to the meaning of section 25, most notably in respect of 'mercantile agent in possession of the goods,' it is

[125] J Goldring, "Floating charges- the awakening", *op cit* fn 68 at 70.
[126] For further discussion of this, see section 4.4.4.
[127] J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 291.
[128] *ibid* at 292.
[129] See further, *Archivent Sales & Developments Ltd v Strathclyde RC* [1985] SLT 154.

now generally accepted that section 25 refers to any transaction which takes place in the ordinary course of business between a buyer and a third-party buyer (sub-purchaser).[130] The transaction must be one where the person in possession of the goods has acquired goods under a contract for the sale of goods.[131] Accordingly, if the goods are supplied as part of a contract for the provision of work and materials, then section 25(1) will cease to be applicable.[132] The effect of section 25 seems to contradict the fundamental premise of a retention of title clause, which prevents title from passing until the seller has obtained the purchase price of the goods supplied.[133] A retention of title clause will thus only be effective under the circumstances where the sub-buyer has acquired the goods in a fraudulent or dishonest manner or is made aware of the original retention of title clause provision. Furthermore, cases such as *Four Point Garage Ltd v Carter*[134] have established that section 25 has a broad remit as buyers need not necessarily take possession of the goods for title to pass to third parties.[135] In practical terms, this severely weakens the utility of retention of title clauses as when a buyer sells goods to a sub-purchaser without paying for the original goods supplied, and the buyer later becomes insolvent, the recourse of claiming the full purchase price of the goods will be of little benefit for the retention of title claimant, rendering the seller at risk.[136]

Due to the inherent popularity and widespread use of retention of title clauses, it is not an uncommon scenario for goods to be bought and supplied on terms which both contain retention of title provisions. In this instance, a seller supplies goods to a buyer on retention of title terms and the buyer resells the goods to a sub-purchaser subject to a similar stipulation, causing a conflict of ownership to exist. One underlying argument for why third-party acquirers of goods ought to take free of their interests, lies in ensuring the free flow of commerce. Section 25(1) allows the transfer of goods in the ordinary course of business, which effectively facilitates commerce and protects innocent third parties. Retention of title clauses should be construed in light of commercial reality and thus, commerce would

[130] See *Newtons of Wembley Ltd v Williams* [1965] 1 Q B 560. It must be noted that this case concerned the Factors Act 1889, rather than the Sale of Goods Act 1978, however the wording of the former is almost identical to that found in the Sale of Goods provision. See further s9 of the Factors Act 1889.
[131] I Davies, *Retention of Title Clauses in Sale of Goods Contracts in Europe,* Oxon: Routledge, 2017 at 109.
[132] See *Dawber Williamson Roofing Ltd v Humberside County Council* [1979] CLY 212.
[133] N Beale and R Mitchell "Retention of title clauses and s25 of the Sale of Goods Act 1979" (2009) 25(7) *Construction Law Journal,* 498-503, at 501.
[134] *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12.
[135] *ibid,* as per Simon Brown J.
[136] In such circumstances, the seller will also encounter several challenges including demonstrating the incorporation of terms, having to identify the goods, having to identify the third-party purchaser, rights to enter premises to recover the goods. Overcoming such issues merely illustrates the difficulties retention of title claimants face in respect of third-party rights. See section 1.4.3 and generally Chapter 4 of this thesis.

be unduly restricted if such clauses would automatically override any sub-sales of goods.[137] Indeed, buyers have been given implicit authority to pass title to sub-purchasers despite the inclusion of a retention of title clause as it has been argued that buyers' businesses would otherwise come to an abrupt halt.[138] Similarly, English law has historically not allowed retention of title clauses to extend to proceeds of sale as the effects on third parties would be unacceptable.[139] Arguably, third parties should take free of their interests as it ensures the protection and enhancement of commerce. However, in *Re Highway Foods*[140] in which all transactions contained retention of title provisions, the outcome favoured the original seller and sub-purchaser by essentially setting aside the buyer, to allow for the seller and sub-purchaser to directly deal with each other.[141] The approach adopted in *Re Highway Foods* of stipulating that the buyer had an agreement to sell, had implications of limiting the buyer's protection to merely a claim of conversion.[142] By limiting the buyer's recourse to only a conversion claim, this creates substantial risk for large cohorts of buyers as retention of title clauses will commonly be construed as agreements to sell, thus negating the impact of section 25(1).[143] In addition, by setting aside the buyer from the transaction, this can lead to adverse consequences such as facilitating fraud, incurring higher transaction costs and causing uncertainty for situations of increased complexity.[144] By cutting out the buyer from the agreement, this effectively unravels and shortens the chain of transactions, causing further uncertainty into an area of law which fundamentally requires clarity and coherence. The effect of *Re Highway* emphasises that sub-

[137] See further, *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226 in which the sub-purchaser attempted to rely on section 25(1) of the Sale of Goods Act but failed as the buyer could not prove that it bought in good faith. For interesting case commentaries, see: S Thomas "The Role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons" (2014) 43(1) *Common Law World Review,* 1-26; K Loi "Retention of Title and Implied Authority to Pass Title to Sub-buyers" (2008) *Lloyd's Maritime and Commercial Law Quarterly,* 427-432.

[138] K Loi "Retention of Title and Implied Authority to Pass Title to Sub-buyers" (2008) *Lloyd's Maritime and Commercial Law Quarterly,* 427-432 at 429. See also *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3; *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12.

[139] D Sheehan "Registration, re-characterisation of quasi-security and the nemo date rules" (2018) 7 *Journal of Business Law,* 584-605, at 590 in which Sheehan argues that '*allowing the retention of title creditor first claim on debts due from customers would decimate the invoice factoring industry where those very debts are sold at a discount to the factor to provide cash for the debtor*.' See also section 4.4.3 for a detailed discussion on prolonged retention of title clauses.

[140] *Re Highway Foods International Ltd (in Administration Receivership)* [1995] BCC 271.

[141] In *Re Highway Foods* meat was sold by Harris to Highway Foods using a retention of title clause. The goods were then sub-sold to Kingfry subject to a retention of title clause. Highway Foods failed to pay the price under the first retention of title clause, which led to Harris and Kingfry agreeing to a new contract of sale once Harris had managed to repossess the goods under the first retention of title clause. For a full account of the factual circumstances of *Re Highway Foods* see further, A Tettenborn "Reservation of Title- Nemo dat and Double Sale" (1996) 55(1) *The Cambridge Law Journal,* 26-28.

[142] See *P4 Limited v Unite Integrated Solutions* [2006] EWHC 2924.

[143] S Thomas "The Role of Authorization in Title Conflicts Involving Retention of Title Clauses: Some American Lessons" (2014) 43(1) *Common Law World Review,* 1-26, at 3.

[144] *ibid* at 14, where Thomas argues that the original seller and sub-purchaser could deliberately fail to pay the middleman, thus leading to a mild form of fraud against the buyer.

purchasers are not always guaranteed protection in their position, as despite the seller in this case agreeing to sell the goods at the same price as the buyer, this clearly will not happen in all instances. It seems that sub-purchasers may be susceptible to sellers inflating their costs to gain a windfall. Similar cases such as *Fairfax*[145] highlight the difficulty of maintaining an effective balance between sellers and sub-purchasers subject to retention of title provisions. In such cases, the seller will seek to maintain an interest in either the original goods or in the proceeds of sale. Most notably, if the seller's claim to proceeds of sale fails, they will undoubtedly seek to exercise control over the original goods by attempting to recover from sub-purchasers. If *Fairfax* were to be followed in providing greater protection to sub-purchasers through implication of authority to sell, there is a greater risk of having to address this unfavourable balance[146] by allowing sellers to trace their claims into proceeds of sale.[147]

Arguably, the decisions in *Re Highway Foods* and *Fairfax* have exposed some inherent weaknesses in the way the English common law has dealt with matters concerning title conflicts, whereby the interpretation of retention of title clauses has had unexpected repercussions on the application of section 25(1) which essentially interferes with the flow of commerce. Evidently for situations involving retention of title provisions and third-party sub-purchasers, third party acquirers of goods should realise that by taking free of such interests, they jeopardise the position of the middleman as the buyer will have to bear the brunt of the risk.[148] In addition, third party sub-purchaser need to be aware that their position does not always guarantee protection as the possibility of being swindled by sellers is highly probable.

1.4.5 Adoption

1.4.5 (a) Widespread Use by Large Firms

The widespread adoption of retention of title clauses is specifically apparent in larger sized businesses who demonstrate a deeper understanding of the usefulness of retention of title clauses within the

[145] *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2007] EWCA Civ 1226.
[146] See K Loi "Retention of Title and Implied Authority to Pass Title to Sub-buyers" (2008) *Lloyd's Maritime and Commercial Law Quarterly,* 427-432 at 431 where she argues that the pendulum has swung from protecting property rights to protecting bona fide purchasers who acquire property without notice. See also *Bishopsgate Motor Finance Corp v Transport Brakes Ltd* [1949] 1 KB 332 as per Lord Denning at [336-337].
[147] D Sheehan "Registration, re-characterisation of quasi-security and the nemo date rules", *op cit* fn 139 at 599.
[148] It has been suggested that §9-320(a) of the United States Uniform Commercial Code provides a more coherent system for dealing with title conflicts involving retention of title provisions. Under American law, retention of title clauses are deemed to be security interests by virtue of §1-201(b)(35) and thus, it is the secured party who bears the losses as they are in a better position than the buyer/ third-party purchaser to take precautionary measures (i.e. insurance) to prevent such losses. A comprehensive account on Article 9 of the Uniform Commercial Code is beyond the scope of the thesis. See generally, G McCormack, *Secured Credit under English and American Law,* Cambridge: Cambridge University Press, 2004.

commercial sector.[149] Large corporate businesses have the capacity to dictate contractual terms, because of their powerful bargaining position which facilitates the inclusion of retention of title clauses. 'Quasi-security devices tend to be used by the larger, better-placed companies who would otherwise be unsecured.'[150] Most notably, retention of title clauses are incorporated within contracts by large companies who are dealing with small businesses of poor reputation, as the retention of title clauses provides the necessary protection from unforeseeable risks. It is suggested that there is a consistent use of retention of title clauses by manufacturers and suppliers, irrespective of the motives of using the clauses to deal with less trustworthy customers.

1.4.5 (b) Requirement for credit insurance cover?

Conferring the use of retention of title clauses in internal commerce practices is advised as such clauses 'improve your chances of being able to avoid a bad debt write-off in the event that you are not paid, but also credit insurers are now much more inclined to require the use of such clause if they are to insure your domestic and export trade.'[151] Therefore, it has become increasingly common for insurers to require the use of a retention of title clause as a condition of their insurance cover, meaning that companies seeking insurance cover for goods are also encouraged to incorporate such clauses. Hence, the widespread use of retention of title clauses also extends to companies wishing to gain valid insurance, thus indicating the inherent worth of the clauses within the insurance sector. As it has become more common for insurances to directly request companies to incorporate retention of title clauses in contractual arrangements, this may have positive implications on companies such as increasing the availability of finance and widening the access for cheaper financing.[152] This highlights that those companies wishing to improve credit insurance terms are very likely to use retention of title clauses. With respect to companies supplying specific goods, it is inherent that retention of title clauses are frequently employed by companies who are supplying unique or high intrinsic value goods in order to alleviate any potential risks in the event of forfeiture.[153] However, as the risk of non-payment of goods is apparent to all businesses, the list of those using a valid retention of title clause is non-exhaustive and is not limited to companies of a certain size or reputation.

[149] See generally, S Wheeler, *Reservation of Title Clauses: Impact and Implications*, Oxford: Clarendon Press, 1991.
[150] V Finch "Security, Insolvency and Risk: Who pays the price?", *op cit* fn 98 at 647.
[151] British Exporters Association, *The BExA Guide to Retention of Title Clauses in Export Contracts,* 2 available at http://www.bexaweb.plus.com/files/rotguideaug05.pdf Accessed 19/01/17.
[152] *ibid* at 36.
[153] *ibid* at 9.

Nevertheless, the inherent restrictions of retention of title clauses as highlighted above, may detrimentally affect insurance and sellers of specific types of goods such as perishable goods. In those situations, a retention of title clause would be of no practical benefit. It is evident that perishable goods invite their own problems with gaining valid insurance cover as suppliers must contend with added complications such as issues with refrigeration or traceability of the goods.[154] In the event of insolvency, insolvency practitioners' primary concerns will be attempting to sell the business on, which may raise fundamental issues with suppliers of perishable goods. To this avail, insurers will insist on the inclusion of a valid retention of title clause, in situations where the goods in question have a resale value.

The relevance of credit insurers insisting on the incorporation of a retention of title clause within terms of sale can be evidenced by the recent administration of House of Fraser in August 2018, which has resulted with an estimated £484 million worth of debt owed to House of Fraser's suppliers.[155] The collapse of House of Fraser led to a 'Pre-pack' acquisition of various House of Fraser entities by the Sports Direct Group. However, on account of the acquisition being an insolvent asset sale, all liabilities are subsequently left behind resulting in the Sports Direct Group not acquiring nor agreeing to pay any liabilities prior to the date of acquisition. House of Fraser suppliers with valid retention of title clauses, which enable the supplier to retain title to stock/goods until they have been paid, are given leverage over Sports Direct by requesting payment under the provision of the clause, before the stock can be sold.[156] Accordingly, the suppliers with valid retention of title clause will receive a better and quicker recovery compared to the position of an unsecured creditor. The plight of the unsecured creditor is discussed in detail in the next chapter.

1.4.5 (c) Smaller businesses and potential drawbacks

Interestingly, a survey aimed at small to medium-sized businesses supplying materials[157] purported a relatively high proportion of not including a retention of clauses (41%).[158] Amongst the smaller-sized businesses it was reported that 14% had never considered the possibility of incorporating a retention

[154] A Syrett "Retention of Title- supplier security or a load of ROT?" (2018), available at https://www.credit-insure.co.uk/acumen-credit-insurance/retention-of-title-supplier-security-or-a-load-of-rot/ Accessed 27/11/18.
[155] *ibid.*
[156] S Clarke and M Trottier "House of Fraser administration: Do suppliers have legal rights over debts?" (2018), Available at https://www.cips.org/en-GB/supply-management/opinion/2018/august/house-of-fraser-administration-do-suppliers-have-legal-rights-over-debts/ Accessed 27/11/18.
[157] Small to medium sized business refers to businesses employing up to 5,000 employees. UK Government, Department for Business, Innovation & Skills, *Mid-Sized Businesses,* available at https://www.gov.uk/government/collections/mid-sized-businesses Accessed 08/04/2018.
[158] J Spencer "The commercial realities of reservation of title clauses", *op cit* fn 99 at 221.

of title clause.[159] Reasons for smaller businesses disregarding the retention of title clause include ignorance of the legal concept, discouraged by the cost implications of obtaining legal advice, or their weak bargaining position against larger trading partners, which stifles their capacity to include a retention of title clause.[160] One noticeable drawback of retention of title clauses, which discourages the use of these clauses in smaller sized businesses concerns the costs involved. There is a lack of registration requirement for retention of title clauses however, the initial negotiating costs of incorporating a retention of title clause may be considered too excessive for smaller businesses.[161] Accordingly, even though the initial cost of incorporating a retention of title clause is relatively low, the enforcement and feasibility costs may ultimately discourage small businesses. This will be most evident in situations where a seller is supplying small stock to a buyer. In these circumstances, retention of title clauses may not be worthwhile: 'where a trade creditor advances a small stock of timber to a building firm for later payment, the sums involved may not justify the costs of drawing up a security agreement.'[162] Similar reasons can be applied to companies who are under tight deadlines to supply a large number of goods; in these situations drafting and incorporating a standard contract with a retention of title clauses may not be suitable to certain companies.

Additionally, the act of incorporating a retention of title clause within any contractual agreement may impact the potential trading relationships between small businesses and partners, as it is implied that the trading partner cannot be trusted and requires the small businesses to safeguard itself. It could be stipulated that such actions 'would not create a good impression of a company's credit worthiness and financial situation.'[163] The lack of trust within trading relationships and the undermining of the retention of title clause may lead to detrimental financial consequences to small companies such as loss of potential business.[164] Amongst smaller businesses, this issue of lacking trust may prove difficult in the process of incorporating a clause effectively within their contracts of sale. Under the current economic climate, smaller businesses may be influenced by powerful trading partners. Buyers may force small scale suppliers to agree to new terms such as granting longer payment periods under the threat of ceasing to continue business with them. In these circumstances, a seller desperate for

[159] *ibid.*
[160] *ibid.*
[161] V Finch "Security, Insolvency and Risk: Who pays the price?"*, op cit* fn 98 at 638.
[162] *ibid.*
[163] S Wheeler, *Reservation of Title Clauses: Impact and Implications*, *op cit* fn 149 at 39.
[164] Undermining the use of retention of title clauses can lead to commercially negative consequences for small-medium sized sellers who rely on such clauses as a source of finance. See further L Gullifer "The interpretation of retention of title clauses: some difficulties" (2014) *Lloyd's Maritime and Commercial Law Quarterly,* 564-580, at 579.

business may have to assent to the new terms. Those weaker parties may accede to such commercial negotiation as the seller may not be able to afford losing such trading business.

One of the most overriding factors that deters small businesses from incorporating valid retention of title clauses is in fact a lack of knowledge of the clauses. Smaller businesses are either unfamiliar or demonstrate poor levels of understanding of the legal concept.[165] This is particularly important as small-sized businesses would have the most to benefit from incorporating a retention of title clauses. 'It might also be argued that small trade creditors who do not think that taking security is justified in relation to a transaction will be able to avoid the consequences that befall an unsecured creditor in an insolvency by resorting to quasi-security measures such as using retention of title clauses in their supply contracts.'[166] In this risk-laden context, it is clear that the added security granted by retention of title clauses would heavily assist smaller companies. In the event of a smaller-sized business having low credit rating, incorporating a retention of title clause would be considered ideal. Reasons demonstrating this point include that using the clause would enable the small business to enter into a contractual arrangement with minimum amount of risk[167] and subsequently being granted higher security if the contract ceases prior to performance.[168]

1.5 Alternative forms of protection

It is evident that retention of title clauses are not the only device which serves the function of security, which secures payment of a debt or obligation. Other standard forms of security include mortgages, charges and floating charges, pledges, leases of personal property and use of guarantee.[169] For example, where a company is supplying goods to another company, a director may issue a guarantee for the goods. Alternatively, the supplier of goods on credit could impose stricter credit control. These alternative forms of protection differ from one another, 'a charge differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt.'[170] Additionally, a mortgage or charge does not rely on a creditor possessing the subject of the security, similar to the position of retention of title

[165] J Spencer "The commercial realities of reservation of title clauses", *op cit* fn 99 at 222.
[166] V Finch "Security, Insolvency and Risk: Who pays the price?"*, op cit* fn 98 at 646.
[167] *ibid* at 637.
[168] The author is aware that 'cease' does not exist as a legal concept. This may include situations of frustration or repudiation.
[169] For a more comprehensive discussion on charges see sections 4.1 and 7.3.
[170] *Burlinson v Hall* (1884) 12 Q.B. D. 347, 350.

clauses.[171] A retention of title clause is distinct from a charge or mortgage as the benefit of retention of title clauses is not conferred from the debtor's own property, a vital distinction which was raised in *Clough Mill v Martin*.[172] Accordingly, there are a variety of devices which serve the function of security.

However, these alternative forms of security interest may not be suitable to all parties. Accordingly, there are various ways in which parties can protect themselves against credit risks, however given the competitive nature of the commercial environment, one of the main motivations for parties is the relevant cost implications and for businesses to remain competitive. Factors to consider include not using methods which accrue expensive legal costs or overly complicated formalities. Alternative forms of security interest may not be suitable to parties as they do not reflect such economic factors. Accordingly, it may be impossible to continue in business and deny trade credit and effectively deduce the creditworthiness of byers.[173] As emphasised by Gullifer, 'they want a method which enables business to be conducted in a normal and straightforward fashion while the buyer counterparty is solvent, but which enables the seller to have effective proprietary protection if the buyer becomes insolvent.'[174] Convenience and cost efficiency are some of the most common drivers for seeking protection by means of retention of title clauses. As such, the cost of incorporating a provision retaining title in the conditions of sale may therefore be a productive and prudent course of action.

1.6 Legal benefits of retention of title clauses

In modern commercial transactions, retention of title clauses are considered to be of vital importance and have been labelled a 'powerful coercive tool'.[175] If recognised by the courts, retention of title clauses give suppliers considerable benefits, to the detriment of other parties who will be disadvantaged to the same degree. A summary of the main advantages of incorporating a retention of title clause in contractual agreements will be provided below. This discussion is necessary as it will lay the foundation for the later analysis of whether retention of title clauses as a legal mechanism are hindered from achieving their functional objectives.

[171] S Cowan, A Clarke and G Goldberg "Will English Romalpa Clauses Become Registrable Securities?" (1995) 54(1) *The Cambridge Law Journal,* 43-51, at 45.
[172] *Clough Mill Ltd v Martin, op cit* fn 45.
[173] A Hicks "Reservation of Title: A Pious Hope" (1985) 27(1) *Malaya Law Review,* 63-112, at 92.
[174] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 245.
[175] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 2.

1.6.1 Insolvency

The issue of insolvency is ever-present in the commercial world, with the constant threat of company insolvency (whereby companies enter liquidation after failing to pay debts) and individual insolvency (individuals entering formal procedures after failing to pay debts) looms on a daily basis. The size of the insolvency problem can be evidenced by annual figures which remain consistently high.[176] It is evident that the problem of insolvent trading partners remains 'static'[177] and can have a substantial effect on a wide range of actors including employees, financial institutions etc. This can be depicted by the insolvency of the well-known retailer BHS in 2016, and the highly publicised administrations of companies such as House of Fraser, Debenhams, Thomas Cook over recent years. The first half of 2020 saw a total of 3,883 companies entering into insolvency during these initial months.[178] The main explanations offered include a contraction of domestic manufacturing activity, low oil prices, overall uncertainty following the EU referendum and the emergence of, and response to the COVID-19 pandemic. During difficult economic times, measures such as incorporating retention of title clauses are vital to protect businesses and strengthen the legal protection offered to suppliers. Therefore, the rise in insolvency figures amounts to one of the many reasons which justifies the need for effective retention of title clauses. For such reasons, retention of title clauses should be considered timely and an appropriate measure to rely upon during these circumstances. The intertwining connection of insolvency and retention of title clauses will be briefly mentioned here, however a comprehensive account of the nature of insolvency proceedings and implications on the functionality of retention of title clause will be discussed fully in Chapter Six.[179]

The persistent rise of insolvent trading partners may be a contributable factor as to why retention of title clauses are in widespread use by those involved in the commercial sector selling and supplying goods. During the last couple of decades, they have formed a common feature of standard forms of contracts, within the business sector.[180] As estimated by Wheeler; 'there is no way of determining how many potential reservation of title claimants there are annually. In the same way there are no accurate figures available for how many unsecured creditors receive nothing from an insolvency situation, or

[176] For a comprehensive record of UK insolvency statistics see: The Insolvency Service Official Statistics, available at www.gov.uk/government/collections/insolvency-service-official-statistics Accessed 10/07/20.
[177] S Albon, Insolvency Chief Executive commenting on corporate statistics for 2016. Available at https://www.gov.uk/government/news/2016-corporate-and-personal-insolvency-statistics Accessed 30/01/17.
[178] Statistics available at The Insolvency Service, *Companies Insolvency Statistics, Q1 January to March 2020,* (2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882091/Commentary_-_Company_Insolvency_Statistics_Q1_2020.pdf Accessed 10/07/20.
[179] See section 6.1.3 for a consideration of retention of title clauses in the context of insolvency proceedings.
[180] G McCormack, *Reservation of Title, op cit* fn 33 at 1.

indeed how many millions of pounds of debt are accumulated by insolvent companies each year.'[181] However, survey figures provide a good estimation and reflect the inherent popularity of retention of title clauses as far back as over 20 years ago, whereby one survey stipulated that 92% of companies incorporated a retention of title clause in their contractual agreements.[182] Furthermore, Monti reported that 'in the context of one administrative receivership, there have been 400 retention of title claims.'[183] It is clear that retention of title clauses are of upmost importance to sellers as a means of minimising the serious impacts of a buyer's insolvency. Accordingly, retention of title clauses offers sellers immunity when a buyer reaches a state of insolvency; 'retention of title holders are immune from [insolvency] compulsory proceedings as they never surrender title to the supplied goods, and so may repossess their products at any time until the purchase price is paid.'[184] On account of the protection granted by the clauses, it is purported that the number of sellers who incorporate a retention of title clause within their contractual agreement is consistently high. One explanation for the proliferation of the clause is the priority afforded to unsecured credits over other creditors.[185] Therefore, as long as the insolvency problem remains, retention of title clauses will be considered relevant within the commercial industry.

Retention of title clauses provide suppliers the opportunity to strengthen the bargaining power in their favour. This is particularly apparent in the event of insolvency proceedings: 'the [retention of title clauses] gives the debtor the power to claim the asset by meeting the invoice price, which actually gives him the stronger position in bankruptcy…If the asset is more valuable to his creditors in the debtor's hands, he may pay the price and obtain the surplus benefit.'[186] Without the protection of an incorporated retention of title clause, suppliers would be left to depend on the conventional methods of security which offer severely limited safeguarding measures.[187] The conventional methods of security such as requesting payment on delivery are considered inflexible methods for suppliers whose bargaining power is severely undermined by such measures. Additionally, such measures are deemed unrealistic within the trade market as the options would leave suppliers in a very weak and vulnerable position and open to commercial dangers. The risks of the commerce market, whereby suppliers could be manipulated by trading partners or incur higher transaction costs would be detrimental to the success of companies supplying goods. This would be particularly problematic to all businesses

[181] S Wheeler, *Reservation of Title Clauses: Impact and Implications*, *op cit* fn 149 at 4.
[182] *ibid* at 6.
[183] *Lipe Ltd v Leyland Daf Ltd* [1993] BCC 385 as discussed in G Monti "The Future of Reservation of Title Clauses in the European Community", *op cit* fn 49 at 867.
[184] J Snead "Rationalising Retention of Title Clauses with Insolvency Law", *op cit* fn 50 at 289.
[185] J Spencer "The commercial realities of reservation of title clauses", *op cit* fn 99 at 221.
[186] J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 297.
[187] *ibid.*

involved in supplying goods, who would overtly be at higher risks but for retention of title clauses. As such, the incorporation of a retention of title clause offers suppliers a flexible alternative as it allows parties to have an anticipatory and defensive mechanism to initiate in the event of a buyer's insolvency.

1.6.2 Lack of registration requirement

One of the most important advantages of retention of title clauses lies in the fact that there is no need to formally register the clauses. As the clauses do not require any form of registration, the clauses can be a quick and informal mechanism which affords the supplier protection in the event of a buyer's inability to pay or insolvency. The lack of registration requirement is beneficial for two principal reasons: flexibility and invisibility. Firstly, it is evident that incorporating a retention of title clause within a contractual agreement is highly flexible compared to conventional security charges, which require formal registration. The validity of a retention of title clause can be gained by a simple addition to a standard trading contract, which further reduces any transactional complexity.[188] The flexibility and ease in which retention of title clauses can be used is thus highly appealing for any potential retention of title beneficiaries.

Secondly, the practicality and commercial utility of retention of title clauses can be attested by the fact that the contractual arrangements between seller and buyer are invisible to third parties. As such, investigating a company's file at Companies House would not expose the existence of a retention clause.[189] In addition, as a matter of routine, goods supplied under an effective retention of title clause arrangement are treated as purchasers on corporate accounts, 'goods which are not the property of the company concerned thus commonly appear as assets in the balance sheet and it is rare for auditors' notes on accounts to mention retentions of title.'[190] Legitimate interests are served by the invisibility aspect such as protecting confidential business of parties and accordingly upholding their market advantage. Businesses can maintain confidentiality of commercial transactions and therefore can be assured that trade secrets will not be made available to competitors. Invisibility of retention of title clauses can be considered advantageous as parties incorporating a retention of title clause as a term of their contractual arrangements are offered higher levels of protection against third parties, as an external outside would not be able to ascertain the existence of the retention of title clause. Accordingly, 'because they will not appear on registers and are always ignored in sets of accounts,

[188] *ibid* at 293.
[189] W Beglan and A Belcher "Jumping the queue" (1997) *Journal of Business Law,* 1-22, at 10.
[190] V Finch, *Corporate Insolvency Law: Perspectives and Principles,* 3rd Ed, Cambridge: Cambridge University Press, 2017, at 468.

[retention of title clauses] remain invisible until they become important.'[191] Invisibility to third parties can be exemplified by the case of *Leyland DAF Ltd v Automotive Products plc*[192] in which 400 retention of title clauses were made against the receivers of Leyland DAF. In this particular case, it demonstrated that it is increasingly difficult for an external third party to ascertain any information on a retention of title clauses of a specific company. As such 'what is certain is that an outsider trying to assess the possible effects of a retention of title clauses on a particular company is unlikely to get very far.'[193]

1.6.3 Credit Rating

Efficiency in the commercial sector forms another legal benefit associated with retention of title clauses. Firstly, the safeguarding nature of the retention of title clauses means that commercial activity is not hindered by issues such as buyers' inability to pay for goods. Consequently: 'commerce would be hampered without the use of an instrument guaranteeing payment; thus [retention of title clauses] generate allocative efficiency'.[194] It has been suggested by Snead that inserting a retention of title clause within their contractual agreements, strengthens the seller's position in obtaining credit.[195]

Secondly, it is also suggested that they improve the efficiency of credit as both parties to the contract (debtors and creditors) achieve their intended aim at a lower cost because of the clauses.[196] It is suggested that security measures do encourage efficiency which can benefit all types of creditors.[197]

Finally, it is also implied that security measures such as retention of title clauses also lead to efficient monitoring because 'the notion that monitoring by a secured creditor will encourage managerial prudence and will bring spill-over benefits to the advantages of creditors as a whole.'[198] This in turn may aid suppliers who are competing in a competitive market as not only do such clauses reduce monitoring costs, they also eradicate the need to add a compensation allowance to the price of the goods, as the clause will reduce the risk of loss incurred by insolvency.

[191] W Beglan and A Belcher "Jumping the queue", *op cit* fn 189 at 10.
[192] *Leyland DAF Ltd v Automotive Products plc* (1993) BCC 389.
[193] W Beglan and A Belcher "Jumping the queue", *op cit* fn 189 at 10.
[194] G Monti "The Future of Reservation of Title Clauses in the European Community", *op cit* fn 49 at 872.
[195] J Snead "Rationalising Retention of Title Clauses with Insolvency Law", *op cit* fn 50 at 291.
[196] R Barnes "The efficiency justification for secured transactions: foxes and soxes and other fanciful stuff" (1993) 42 *Kansas Law Review,* 13-73, at 14.
[197] V Finch "Security, Insolvency and Risk: Who pays the price?", *op cit* fn 98 at 649.
[198] *ibid.*

1.6.4 A self-help mechanism in commercial disputes

Legal doctrines are considered vital within the commercial environment as a means of ensuring capital development.[199] One of the most common precautionary methods used by businessmen is retention of title clauses. Within the commercial field, the vast majority of civil disputes are resolved through out of court settlements. As such, very few civil cases are adjudicated in formal court proceedings, rather the process of negotiation between parties is overwhelmingly evident.[200] The reasons behind such a limited number of litigated civil claims is partly due to the competitively-driven commercial environment which encourages negotiations amongst businessmen.[201] Additionally, it is apparent that informal negotiation is regarded as a cost effective method of settlement, compared to the expensive alternative. Cost effective measures such as negotiation are deemed crucial within the commercial sector as they offer the prospect of efficient resolutions to commercial disputes, notably saving time and expenditure, which are indispensable components to the avid businessman. Additionally, these measures avoid any unwanted publicity concerns which may arise from formal litigation.

Negotiation of contracts between parties is deemed to be a more flexible method as it reflects the business practice: 'businessmen recognize that trading relationships form a mutually beneficial network and are reluctant to disrupt this network by litigating their disputes.'[202] Contentious litigation is thus used as a measure of last resort by businessmen, who prefer to action non-legal sanctions to resolve commercial disputes as a way to preserve fruitful business relationships. As a means of continuing business relationships and contributing to capital profits in the commercial market, businessmen take security precautions which can potentially limit future losses and shortcomings. Consequently, 'there is often a degree of rational planning at the outset of trading relationships with careful provisions for as many future contingencies as can be foreseen.'[203] One of the most prevalent contingencies in the business environment is the insolvency of a trading partner. If a buyer cannot complete the contractual agreement, remedial costs can be significant for the seller and could result in costly contract penalties. As such, businessmen incorporate legal sanctions into their contractual agreements in order to safeguard their assets and reduce monetary loss. Accordingly, 'in an economic climate plagued by the risk of insolvency, sellers will not wish to sell unless they can be sure of getting paid.'[204]

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[199] M Weber and M Rheinstein, *On Law in Economy and Society,* New York: Simon and Schuster, 1954, at 66.
[200] S Wheeler, *Reservation of Title Clauses: Impact and Implications, op cit* fn 149 at 1.
[201] *ibid* at 5.
[202] *ibid* at 2.
[203] *ibid* at 3.
[204] G Monti "The Future of Reservation of Title Clauses in the European Community", *op cit* fn 49 at 866.

In a business environment, one of the most prevalent risks for a supplier is the possibility of a trading partner failing or refusing to pay for the goods supplied. Accordingly, retention of title clauses are used by companies as a business mechanism to compensate the harsh commercial realities; 'retention of title clauses gives the legal backing to [businessmen's] desire for justice.'[205] Using retention of title clauses appropriately can reap a wide range of commercial advantages. To action recovery of goods, allows companies to gain a good commercial reputation as it demonstrates strength. Commercial strength and reputation are deemed valuable as such qualities hold the potential to broaden business opportunities and contribute to the progress and development of the company. Minimising loss through the incorporation of retention of title clauses is a pragmatic mechanism which offers leverage and a form of life support for companies to remain competitive within the commercial field. Goods can be seized and reverted back to the seller, whereby the goods can be easily resold to alternative buyers, thus increasing 'the opportunity for a continuing commercial relationship.'[206] As a legal mechanism retention of title clauses can facilitate economic development and sustainable growth.[207] Parties are allowed to use the assets and generate profit concurrently in the course of business.

1.7 Conclusion

As the preliminary background information on retention of title clauses has since been outlined, it is now necessary to continue the exploration of the legal benefits of the clauses in more detail. The discussion will proceed with arguably one of the most important functions of a retention of title clause: affording sellers with super-priority status in the event of insolvency. A detailed discussion on how these clauses operate under the current insolvency framework is thus necessary to provide the impetus to highlight how these clauses are obstructed from achieving their functional objectives by legal uncertainty. As will be explored, these issues are exacerbated significantly by the minefield of issues stacked against retention of title clauses operating as conceptually intended.

[205] British Exporters Association, *The BExA Guide to Retention of Title Clauses in Export Contracts,* 21 available at http://www.bexaweb.plus.com/files/rotguideaug05.pdf Accessed 19/01/17.
[206] *ibid* at 2.
[207] G Castellano "Reforming Non-Possessory Secured Transactions Laws: A New Strategy?" (2015) 78(4) *The Modern Law Review,* 611-640, at 611.

CHAPTER 2: THE CIRCUMVENTION OF *PARI PASSU* BY RETENTION OF TITLE CLAUSES

2. Introduction

This chapter explores the circumvention of the *pari passu* principle by retention of title clauses. The main hypothesis of this research is to shed light on how retention of title clauses as a commercial mechanism are hindered from their functional objectives. As will be explored in the forthcoming chapters, there is a general reluctance and uncertainty demonstrated by the courts to enforce retention of title clauses and as such their principal objective in offering protection to sellers in the event of economic hardship is significantly impeded. Rather than making a sweeping pronouncement that certain types of retention of title clauses are unenforceable, the courts have responded to the clauses in a reactive, piecemeal, and disjointed manner which further obstructs parties from implementing and relying on such contractual provisions. It can be argued that the courts' hostility towards the more complicated retention of title provisions is a subtle way of counter-balancing the legal benefits bestowed on claimants relying on such clauses in the event of a buyer's insolvency and balancing the rights of third parties affected by retention of title clauses.[208] These clauses conceptual nature is founded by contractual freedom which allows parties to agree on the allocation of property rights and when title to the goods will transfer to the buyer, however, such allocation has consequential implications on third parties.[209] Arguably, retention of title clauses have the greatest impact on third parties during the insolvency proceedings. One of the main legal benefits associated with retention of title clauses is the priority which is afforded to sellers in the event of insolvency. The priority status afforded to retention of title claimants serves as a significant advantage and may suggest a reason for the clauses' proliferation and popularity as a contractual agreement.[210] To this end, the general reluctance observed by the courts towards more complicated retention of title clauses may inadvertently provide a means of upholding an appropriate balance to the super-priority status afforded to claimants relying on title retaining provisions, a priority which allows claimants to bypass some of the core principles and features of the current insolvency framework. If the retention of title clause is effective in operation, this undoubtedly provides sellers a level of immunity from

[208] For supporting literature on the contention that the courts are adopting a balancing exercise towards retention of title clause to counter-balance the super-priority status afforded to sellers with the rights of third parties, most notably creditors, see L Gullifer "Retention of title clauses: a question of balance" in A Burrows and E Peel (eds), *Contract Terms,* Oxford: Oxford University Press, 2007, at 286-313.
[209] L Gullifer "Retention of title clauses: a question of balance" in A Burrows and E Peel (eds), *Contract Terms,* Oxford: Oxford University Press, 2007, at 286.
[210] J Davey and C Kelly "Romalpa and Contractual Innovation", *op cit* fn 5 at 359.

insolvency proceedings as they do not relinquish title to the goods and as such, are able to repossess their supplied goods in the event of a buyer's insolvency ahead of third parties. The priority granted to sellers under a retention of title clause during insolvency proceedings is thus detrimental to third parties who have an economic interest and competing claims to the goods of the insolvent buyer. Undoubtedly, the third parties are adversely affected by quasi-security devices or other security devices which reduce the assets available to them upon the insolvency of a buyer. These third parties can be classified as secured or unsecured creditors and are subjected to insolvency principles which dictate the distribution of available assets during insolvency proceedings, whereas retention of title holders are able to bypass the *pari passu* principle to the benefit of realising and repossessing their supplied goods and assets.

Accordingly, this chapter will focus on the *pari passu* principle under the current insolvency framework and will evidence how the principle is circumvented by retention of title clauses. The discussion will also provide examples of some of the hardships caused during the insolvency proceedings, which emphasises why retention of title clauses are such a useful anticipatory and defensive mechanism to initiate in the event of a buyer's insolvency. This discussion follows on from the proceeding discussion in the introduction outlining the various legal benefits associated with retention of title clauses and continues the exploration of one of the principal reasons for the use of the clauses: higher priority in insolvency proceedings. Arguably, the super-priority status afforded to retention of title claimants, which accords the supplier with preferential treatment in the event of a buyer's insolvency is one of the most important aspects of the clauses in respect of their functional objectives. As such, this chapter will explore the *pari passu* principle and why English law permits the recognition of security interests and quasi-security devices to the detriment of the insolvency principle which ultimately disadvantages the remaining creditors involved in the insolvency proceedings. By doing so, the discussion will turn to analysing the justifications for the recognition of security interests and quasi-security devices and whether such mechanisms serve wider economic and political interests.

2.1 *Pari Passu* Principle

2.1.1 Definition

Pari passu is a basic principle of insolvency law which refers to an equal distribution of available assets amongst creditors according to their rights and interests in the company.[211] The principle is recognised by Section 107 of the Insolvency Act 1986. 'The *pari passu* principle, is one manifestation of formal

[211] Section 107 Insolvency Act 1986.

equality in insolvency law.'[212] *Pari passu* is regarded as one of the most fundamental principles of insolvency law[213], which ensures that proportion of assets are distributed in accordance with the size of the creditors claim.[214] The principle's fundamental importance was recognised by the Cork Committee.[215] *Pari passu's* longevity has also been acknowledged, 'the *pari passu* rule has provided the basic distributional matrix in corporate insolvency law for nearly 150 years.'[216] However, its origins can be dated further as Lord Mansfield emphasised the importance of the principle in the case of *Worsley v Demattos*[217] in 1758, where his Lordship implied that distributing insolvent assets equally amongst creditors was one of the main objectives of bankruptcy law.[218]

The principle is applicable to all insolvency proceedings which involve a distribution of insolvent assets amongst creditors and thus can be applied to the bankruptcy of individuals and the liquidation of companies.[219] The principle is thought to be all-pervasive, based on the notion that all losses following a liquidation, should be borne by unsecured creditors on an equal basis.[220] Unsecured creditors are thus paid *pro rata* to the extent of their pre-insolvency claims or share rateably the assets available for residual distribution in the event of an insolvency.[221] Creditors such as secured creditors or preferential creditors who hold similar claims are to be paid back the same proportion of their debts[222], thus ensuring a degree of fairness in insolvency proceedings. As per Lord Romilly, insolvency law 'takes [creditors] exactly as it finds them.'[223] The *pari passu* principle is only applicable to the remaining unencumbered assets of an insolvent company, which are available for distribution at the company's insolvency proceedings.[224]

The rationale for the principle is that it prevents unfairness in insolvency proceedings. Prior to the principle, the swiftest creditor would unfairly benefit from insolvency proceedings on a first come first served basis. As emphasised by Goode, 'in the absence of an insolvency proceeding, is that the race

[212] R Mokal "Priority as Pathology: The Pari Passu Myth" (2001) *Cambridge Law Journal,* 581-621, at 583.
[213] See further *Re Airbase (UK) Ltd* [2008] EWHC 124 at [29] and *Re Nortel GmbH* [2011] EWCA Civ 1124.
[214] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 235.
[215] K Cork, *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 ('Cork Report') para 1220.
[216] D Milman "Proprietary Rights on Corporate Insolvency" in A Clarke, *Current Issues in Insolvency Law,* London: Stevens & Sons, 1991, at 59.
[217] *Worsley v Demattos* (1758) 1 Burr 467; 97 ER 407.
[218] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?" (1999) 3 *Company Financial and Insolvency Law Review*, 84-105, at 93.
[219] R Calnan, *Proprietary Rights and Insolvency,* 2nd Ed, Oxford: Oxford University Press, 2016, at 3.
[220] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 236.
[221] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 599.
[222] *Worsley v Demottes, op cit* fn 197 as per Lord Mansfield at [412].
[223] *Re Smith, Knight & Co, ex p. Ashbury* (1868) LR. S Eq. 223 as per Lord Romilly at [226].
[224] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 600.

goes to the swiftest.'[225] Without an orderly list of distribution, those with the greatest resources, power or influence would unfairly benefit to the detriment of other unsecured creditors.[226] The *pari passu* principle eliminates the incentive of creditors to enforce their rights with alacrity to the extent of reducing the value of the distribution estate as a whole.[227] It was thought that the previous first come first serve basis added uncertainty to the insolvency proceedings as it decreased the utility of risk averse creditors.[228] Hence, 'the individualistic pre-insolvency debt-collection regime is a mad race to the asset pool. Since that race is undesirable, the collective insolvency system steps in to stop it.'[229] In reality, the consequence of the alacrity of the more powerful creditors and a limited amount of insolvent estate to begin with, results in a rapid disappearance of the insolvent estate. Consequently, one of the implications of this non-hierarchal method is that creditors who are late or lack the necessary power or resources would be left with a very limited pool of assets or detrimentally worse, no assets to enforce their claim on. Thus, the first come first serve approach would ultimately result in an unbalanced distribution of assets amongst creditors, which can have negative economic implications in the insolvency market as a whole. Where there is a cumulative pattern of insolvency proceedings resulting in an unbalanced distribution of assets, this is deemed problematic as only certain commercial actors would benefit, most likely the powerful creditors, thus creating an unfair playing field. Where there is a surge in unbalanced distribution of insolvent assets to powerful creditors, this can hinder economic growth of the insolvency market.

Through the application of the *pari passu* principle, groups of claimants most notably unsecured creditors, are forced to queue for their allocation of residual assets in insolvency proceedings. A degree of fairness is ensured by the principle as it provides for equality of treatment amongst unsecured creditors.[230] The principle has been praised by Calnan, who states: 'reliance on the principle that equality is equity is a sensible, pragmatic solution, which has history on its side.'[231] Accordingly, the intention behind the principle is to provide a means of ensuring a fair and balanced approach to the distribution of insolvent assets, where parties are treated equally and paid *pro rata* to the extent of their insolvency claim.

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[225] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 236.
[226] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 606.
[227] V Finch and S Worthington "The *Pari Passu* Principle and Ranking Restitutionary Rights" in F Rose, *Restitution and Insolvency,* London: Mansfield Press, 2000, at 3.
[228] R Mokal, *Corporate Insolvency Law: Theory and Application,* Oxford: Oxford University Press, 2005, at 104.
[229] *ibid.*
[230] V Finch and S Worthington "The *Pari Passu* Principle and Ranking Restitutionary Rights", *op cit* fn 227 at 3.
[231] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 41.

A collective regime which ensures an orderly list of distribution through the principle of *pari passu,* is also thought to keep legal costs and delays at a minimum.[232] As the principle establishes equal distribution amongst creditors according to their individual claims and rights, this avoids the courts deliberating difficult choices if assets were allocated alternatively on the basis of needs or inability to sustain losses etc.[233] Indeed, 'the collectively of dealings with unsecured creditors as a class is enhanced by the *pari passu* principle which is efficient in so far as it avoids the costs of dealing with claims on their individual merits.'[234] The unfavourable status of unsecured *pari passu* creditors is illustrated in detail by the case of *British Eagle.*[235] The points argued by the courts are not specifically relevant to the distribution allocation as per the *pari passu* principle but will provide a detailed background to the protection afforded by insolvency law. The case concerned two airline operators, British Eagle International Airlines and Compagnie Nationale Air France. Both companies were members of a clearing house scheme. The objective of the clearing house scheme was in situations when members performed services for one another, they would be provided machinery in order to settle any debts and credits. British Eagle Airlines entered into liquidation and the liquidator claimed £7,925 from Air France, which amounted to the difference in value of services performed by British Eagle to Air France before entering the liquidation process. Air France claimed that the provisions contained within the clearing house arrangement, sought to treat Air France as analogous to the position of secured creditor, without the creation and subsequent registration of a charge on the impugned book debts. Thus, Air France purported to opt out of section 302 of the Companies Act 1948, which contained provisions relating to the *pari passu* principle. Section 302 stated the following:

> 'Subject to the provisions of this Act as to preferential payments, the property of the company shall, on its winding up, be applied in satisfaction of its liabilities pari passu, and, subject to such application, shall unless the articles otherwise provide, be distributed among the members according to the rights and interests in the company.'[236]

The matter to be discussed was in the event of a member of the clearing house becoming insolvent, whether or not the clearing house arrangement still applied to the creditors relating to credits and debts which have not yet been cleared, or whether the insolvent's property should be distributed in line with general liquidations rule, in which brings all other creditors on the same footing as per the principle of *pari passu.*

[232] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 601.
[233] *ibid* at 602.
[234] *ibid.*
[235] *British Eagle International Airlines v Compagnie National Air France* [1975] 1 WLR 758, [1975] 2 All ER 390.
[236] Section 302 of the Companies Act 1948.

The House of Lords held that Air France could not contract out of the provisions contained within section 302 of the Act, due to public policy reasons and as result the insolvent assets of British Eagle were to be distributed as per the ordinary liquidation rules of *pari passu.* The clearing house arrangement could not prevail over the ordinary list of distribution priority of insolvency proceedings. Therefore, the clearing house creditors did not amount to the same position as secured creditors without the requirement of creation and registration on charges. Accordingly, as per Lord Morris, 'the property of the company fell to be applied in satisfaction of its liabilities pari passu.'[237] Consequently, the sum owed was thus made receivable to the benefit of all other creditors.

If the clearing house scheme was to be approved, it would have placed Air France in a better position than all of the other body of creditors. Lord Cross emphasised that approving the clearing house arrangement would be particularly unfair and anomalous to the remaining body of unsecured creditors.[238] Therefore, contracting out of the principle of *pari passu* as contained in section 302 of the Companies Act 1948 would be contrary to public policy.

2.1.2 Bypassing the principle through retention of title

Since the principle's importance within insolvency law has been so widely recognised as a method of ensuring fairness to creditors through an orderly list of distribution, any non-conformity should raise concerns.[239] Through the incorporation of a retention of title clauses or through the incorporation of other proprietary rights, a holder of the security interest can bypass the *pari passu* principle and be accorded with preferential treatment.[240] Accordingly, 'security avoids the effects of *pari passu* distribution by creating rights that have priority over the claims of unsecured creditors.'[241] Retention of title clauses largely undermine the principle as it allows a holder of a retention of title clause, to cover the insolvent goods and any products and proceeds of the insolvent assets.[242] This is permissible by law as the principle is restricted to ordinary creditors, any pre-insolvency rights such as proprietary interests must be respected by law, meaning that any proprietary claimants are thus distinguished

[237] *British Eagle International Airlines v Compagnie National Air France, op cit* fn 235 as per Lord Morris of Borth-y-Gest at [761].
[238] *British Eagle International Airlines v Compagnie National Air France, op cit* fn 235 as per Lord Cross at [780].
[239] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 93.
[240] There are a number of exceptions to the *pari passu* principle: rights which are analogous to security, dividend claims which are given preferential treatment and deferred claims and so forth. Discussing all of the exceptions to the principle would exceed the scope of this thesis and as such the focus of the discussion will remain largely on the implications of retention of title clauses. For a comprehensive account of the exceptions to the *pari passu* principle, see R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 247-250.
[241] V Finch "Security, Insolvency and Risk: Who Pays the Price?", *op cit* fn 98 at 634.
[242] R Goode "Is the Law Too Favourable to Secured Creditors?" (1983) 8 *Canadian Business Law Journal,* 53-80, at 59.

from the principle.[243] As a consequence, the *pari passu* principle is not applicable to the rights of secured creditors, retention of title holders or creditors holding assets on trusts.[244] As summarised by Goode:

> 'Fixed security interests and other real rights held by third parties do not need to feature in the ordering of priorities because to the extent that assets held by the company are subject to these they do not constitute the property of the company at all and therefore do not compete in the priority stakes.'[245]

These deviations are recognised by law as such assets do not belong to the company and thus cannot fall under the distribution list.[246] Accordingly, the scope of *pari passu* is restricted in relation to ordinary creditors and the estate made available to such creditors by law.[247] Holders of security interests are able to assert their claims against the insolvent assets first, followed by the residual pool of assets being distributed amongst other types of creditors abiding to the *pari passu* principle. The more extensive these particular rights are, the amount of residual goods available for distribution to unsecured creditors will be significantly reduced.[248] As such, retention of title claimants will be able to assert their claim to the goods and be given priority ahead of the other creditors who are subjected to the insolvency principle.

As outlined above, retention of title claimants are afforded super-priority status whereby their interests are preferred and prioritised ahead of other interested parties such as the unsecured creditors and all-monies floating charge holders. As such, consideration must now be given to explaining the justification for allowing retention of title claimants to benefit from having super-priority status. In other words, why does the law permit one particularly creditor, in this instance the retention of title claimant, to be preferred over all other creditors? The rationale is based on the notion that a person who supplies goods to the buyer's company under a retention of title clause, in exchange for a debt has essentially added to the company's assets. From the perspective of the buyer, the exchange of goods for a debt is considered more useful than an invoice price, as the goods effectively bring in external value for the business without demanding more value in return.[249] This can be contrasted with conventional forms of security such as the position of floating charge holders or unsecured creditors who are inhibited by an inflexibility that prevents the supplied goods from

[243] V Finch "Is Pari Passu Passe?" (2000) 5 *Insolvency Lawyer,* 1-18, at 3.
[244] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 246.
[245] *ibid* at 275.
[246] *ibid* at 246.
[247] V Finch "Is Pari Passu Passe?", *op cit* fn 243 at 3.
[248] R Goode "Proprietary Rights and Unsecured Creditors" in B Rider, *The Realm of Company Law,* London: Kluwer Law International, 1998, at 184.
[249] J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 291.

being dealt with in the course of trade.[250] As such, traditional forms of security lack sufficient bargaining power as these forms of security restrict a buyer or debtor from capitalising on the assets and maximising the inherent value of the goods. Economic reasons[251] have thus been advanced which justify the super-priority status for retention of title claimants as the supplier has ultimately increased the company's pool of assets. Following on from this point, it would be grossly unfair if other creditors were to be allowed to benefit and obtain an unjustified windfall at the expense of the supplier who advanced the buyer's total assets and funds. On the point of unfairness, it has also been suggested that the super-priority status is used as device for precluding the first creditor from obtaining an exclusive monopoly over the assets of the company.[252] Jackson and Kronman describe this type of circumstances as a 'situational monopoly' whereby the first creditor on the scene would receive a competitive advantage to the detriment of the buyer who would not be able to raise any future credit without the first creditor exploiting their monopolised power.[253] The monopoly of assets would remove the availability of other creditors and would result in an unfair distribution of bargaining power. Accordingly, the super-priority status afforded to retention of title claimants blunts the situational monopoly that would otherwise arise in such circumstances by bringing in additional value to an otherwise closed pool of creditors. As such, retention of title claimants are allowed to circumvent the insolvency framework as their goods have effectively increased the value of the assets of the buyer, thus affording the buyer's company with an efficient and profitable investment.[254]

In addition, affording retention of title claimants with super-priority status also provides a means of precluding the claimant from obtaining credit elsewhere, which prevents postponed creditors from having to contract on a riskier basis[255] or from having to settle with a lower ranking security.[256] In turn, it can be argued that the super-priority status safeguards the security interests of these later creditors by alleviating the possibility of having to settle with no security at all. Furthermore, if the goods

[250] See further, R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 104. A similar argument is put forward by Snead in J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 298.
[251] There are further arguments that retention of title clauses are economically efficient such as the ease in which they can be included in supply contracts and that they reduce monitoring costs. See further, J Snead "Rationalising retention of title clauses with insolvency law", *op cit* fn 50 at 297.
[252] T Jackson and A Kronman "Secured Financing and Priorities among Creditors" (1979) 88 *The Yale Law Journal,* 1143-1182, at 1145.
[253] *ibid,* at 1171.
[254] H Kanda and S Levmore "Explaining Creditor Priorities" (1994) 80 *Virginia Law Review* 8, 2103-2154, at 2106.
[255] The freedom of contract argument advocates that any creditor may be expected to take risk-reducing precautions such as adjusting interest rates to outweigh any potential risks. See further section 2.2.3.
[256] G McCormack, *Secured Credit under English and American Law,* Cambridge: Cambridge University Press, 2004, at 173.

supplied by the retention of title claimant helped the buyer's business financially by earning profit, this would once again strengthen the position of any existing creditors by potentially maximising their security interest.[257] Viewed holistically, the super-priority status appears to strike a balance between safeguarding the position of existing creditors and prioritising the position of retention of title claimants for financing and increasing the pool of assets of the buyer.[258] Evidently, the super-priority status afforded to retention of title claimants creates a competitive advantage for those seeking to rely on the clauses and a variety of justifications have been put forward for rationalising why retention of title claimants have been granted with super-priority status.

Gaining proprietary status ensures that the assets are prevented from entering the pool of residual estate, thus gaining priority in insolvency proceedings. This preferential treatment results in the holder of the security interests maximising their possibility of recovery in the event of insolvency.[259] As mentioned previously, in the event of encountering a company's insolvency or where a company cannot meet its financial fixed obligation, the security interest holder has priority over the company's other creditors. Accordingly, retention of title clauses functional objective of granting the supplier priority and subsequent immunity from the insolvency principle, reinforces the notion that retention of title clauses provide an economic lifeline to sellers in the face of economic hardship of the buyer. On the other hand, the recognition of security interests and quasi-security devices leads to consequences which may be regarded as unfair to third parties who are directly competing for the assets of the insolvency buyer.

The effects of being denied proprietary rights in insolvency are illustrated, for example by the case of *Re Andrabell.*[260] The matter at issue was whether credit to a particular account of an insolvent trust, amounted to an implied trust in favour of a creditor.[261] If the court held that an implied trust was present and subsequently a proprietary interest was established, then the money would be paid directly to the creditor in question.[262] However, if an implied trust was not found, then the creditor would have to rank according to the *pari passu* principle amongst all other unsecured creditors of the company. As such, the importance of establishing a proprietary interest is paramount as it would

[257] R Mokal "The Search for Someone to Save: A Defensive Care for the Priority of Secured Credit" (2002) 22 *Oxford Journal of Legal Studies* 4, 687-728, at 728.
[258] For a similar argument, see further: T Jackson and A Kronman "Secured Financing and Priorities among Creditors", *op cit fn* 252 at 1145.
[259] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 7.
[260] *Re Andrabell* [1984] 3 All ER 407.
[261] The author acknowledges that the main issue at hand was whether a fiduciary relationship imposed a duty to account proceeds of resale. See sections 4.4.3 and 5.1.3 respectively.
[262] R Calnan, *Proprietary Rights and Insolvency, op cit* fn 219 at 23.

determine whether or not the creditor would be paid in priority or whether the creditor would receive very little in the insolvency proceedings. In *Re Andrabell,* Airborne had supplied travel bags to the retailer Andrabell on the basis of a retention of title clause, which stipulated that ownership of the bags should not pass until the full purchase price was paid. Andrabell subsequently sold the bags and paid the proceeds into its bank account. Andrabell went into liquidation owing Airborne the sum of £28,810, which included the sale of the bags supplied and mixing the proceeds in its bank account, which amounted to a total of £8,103 in credit. The question to be determined was whether a proprietary interest was established over the money standing to the credit of the bank account. It was decided by Gibson J that there was insufficient evidence to warrant an implied trust over the proceeds of sale and thus, Airbone had to rank according to *pari passu* amongst the remaining unsecured creditors. In this case, the court held that an implied trust was not found, which resulted in the creditor having to rank according to the insolvency principle and the money could not be paid directly to the creditor. Instead, the creditor would be subjected to the *pari passu* insolvency distribution of claims. The plight of being ranked as an unsecured creditor, severely weakened the chances of Airbone realising any assets from the remaining pool of available assets in the insolvency proceedings.

2.1.3 Breaching public policy?

It should be noted that the law does not readily allow contracting out of collective arrangements that allow preferential treatment amongst certain creditors, which ultimately denies or disadvantages other creditors to the same degree.[263] As per Vinelott J in *Re Maxwell*[264]*,* it is clear that courts do not allow creditors to arrange with the debtors any measures which benefit the individual creditor during the insolvency proceedings, which directly hinder or denies the prospects of the other creditors.[265] *Re Maxwell* dealt with an agreement which issued certain bonds by company Maxwell Finance Jersey Lmd (MFJ) in 1989. The bonds were held by parties and the bonds were guaranteed by another company Maxwell Communications Corp (MCC). It was provided that MCC's liability to the bondholders would be subordinated. Subsequently, MFJ became insolvent and MCC were put in administration. An order was applied by the administrator which would exclude the parties who held the bonds from participation of an arrangement, which stipulated that once secured and preferential creditors had been paid, the remainder would be distributed according to the principle of *pari passu* amongst all the other unsecured creditors. Approving the order intending to exclude the bond holders from participating in the arrangement, meant that the bondholders would only benefit once all other

[263] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 628.
[264] *Re Maxwell Communications Corporations plc (No.2)* [1994] 1 All ER 737.
[265] *ibid* as per Vinelott J at [750].

unsecured creditors were paid in full. Evidently, if such an order was approved, the parties holding the bonds would most likely receive nothing in the insolvency proceeding. The bondholders argued that the agreement should be held void for breaching the *pari passu* principle, which was rejected by Vinelott J. It was held that the subordination agreement was valid since neither the insolvency set off rule nor the *pari passu* principle made the contract invalid. There was no reason why a creditor cannot agree to subordinate his claim to other creditors, during the event of insolvency. The *pari passu* principle prevents a creditor from arranging to obtain an advantage in the event of a company's insolvency. However, it was implied that subordination did not undermine the principle of *pari passu* and as such the agreement was held valid. The case established that parties can make arrangements to contract out of the *pari passu* principle, providing that the arrangement does not involve divesting the estate from other creditors.

It was also established by the House of Lords in *British Eagle*[266] that the act of denying or disadvantaging other creditors would be contrary to public policy. In the *British Eagle* case, Air France was not able to contract out of the *pari passu* principle to gain for their own individual and direct benefit from the liquidation of the British Eagle airline. Such a process would breach the *pari passu* principle as it would remove a sum of British Eagle's estate, which otherwise would be available to other general creditors of the British Eagle's airline.[267] As stated by Finch, 'effect would not be given to a contractual agreement that attempted to avoid collectivity by purporting to allow certain creditors to opt out of *pari passu* distribution of the residual estate to their advantage.'[268] The public policy referred to by Lord Cross in the *British Eagle* case, seems to stem from the earlier case of *Ex p. Mackay*[269], which held that no creditor may obtain a position of preference without the creation of a valid security interest. As stated by Mellish LJ in the Mackay case; 'a person cannot make it part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws.'[270] It is evident that the underlying public policy issue arising from *British Eagle* refers to the prohibition of one preferred creditor seizing an insolvent party's estate or property without having a security interest vested in that specific property. Air France could not contract out of the *pari passu* principle as this would be deemed to infer an additional advantage to Air France, which would prevent any further distribution according to the

[266] *British Eagle International Airlines v Compagnie National Air France, op cit* fn 235.
[267] See further, V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 630.
[268] *ibid* at 629.
[269] *Re Jeavons, Ex parte Mackay* (1873) LR 8 Ch App 643.
[270] *ibid* as per Mellish LJ at [648]. See also James LJ at [647] for a similar argument.

relevant priorities. However, as discussed below, this does not apply to pre-arranged contracts with proprietary interests such as retention of title clause which are recognised by law.

2.1.4 Are security interests too extensive?

Having established various different justifications for why the law permits the taking of security and allows the bypassing of the *pari passu* principle, it is now important to consider whether such rights are deemed too extensive. This is important for the underlying discussion as to whether the courts' alleged reluctance to enforce more complicated retention of title clauses is justified on the basis that the courts' reluctance is to counterbalance the super-priority status afforded to retention of title claimants and other security interests.

One argument is that the current law gives secured creditors and proprietary claimants far too much freedom. Goode emphasises that 'English law gives secured creditors a degree of freedom of contract, and an immunity from obligation, which significantly exceeds what is to be found in almost every other major jurisdiction, whether common law or civil law.'[271] It is submitted that one of the intentions of insolvency law is to maximise the value of the insolvent estate; by preferring particular groups of creditors over another, however the recognition of security interests and quasi-security interests undermines this objective. This contention is supported by Cantlie who argues that, 'singling our certain creditors for preferential treatment in bankruptcy clearly undermines [the] objective of controlling self-interest and optimizing the aggregate value of creditor's claim.'[272] Within the context of retention of title clauses, regardless of any precautionary methods which attempt to safeguard creditors, a valid retention of title clause can completely undermine a creditor's protection, leaving unsecured creditors at risk of being seriously vulnerable by reducing the pool of assets available for them to claim.

One of the central problems in the insolvency market, is deficiencies in assets to satisfy all claims. It is evident that there is an influx of creditors and holders of security interest competing for a share of a limited pool of insolvent assets. It is clear, that there is simply not enough to satisfy claims in their entirety.[273] Thus, these deficiencies will have an immediate and direct consequences upon the creditors involved, most notably the risk of non-payment. It is argued that the inadequacy of the *pari passu* principle, means that certain groups of secured creditors and holders of proprietary interests

[271] R Goode "Proprietary Rights and Unsecured Creditors", *op cit* fn 248 at 190.
[272] S Cantlie "Preferred Priority in Bankruptcy" in J Ziegel, *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994, at 421.
[273] *ibid* at 421.

are unduly advantaged to the detriment of unsecured creditors. Accordingly, 'at the remedial level too much dominance has been allowed property claimants in general and secured creditors in particular.'[274] The unsecured creditors bear the worst implications of allowing security and the bypassing of the *pari passu* principle. As such, the contention mostly lies in the fact that the losses are endured significantly by the unsecured creditors. It has been argued that there is a stark difference in judicial preference between, on the one hand the secured creditors and proprietary claimants and on the other hand the unsecured creditor's position.[275] This is supported by Henton who argues that 'after the onset of insolvency, affected parties [unsecured creditors] play a zero sum game.'[276] Thus, unsecured creditors will most likely suffer the grave implications of non-payment. It is submitted that unsecured creditors are frustrated/disappointed with how they are treated by the insolvency system.[277] Nevertheless, unsecured creditors are not the only victims, as deficiencies in the insolvency process can be experienced by all groups. Even creditors who protected their interests may only recover a small proportion of their investment. Accordingly, a retention of title clause or other security devices can completely undermine the protection afforded to creditors.

However, it has been acknowledged that ranking different claims in insolvency law is exceedingly challenging. It is difficult to rank creditors in accordance with how worthy they are to receive payment from a debtor. As emphasised by Calnan, 'it is always possible for a particular interest group to put forward reasons why its particular creditor should have priority over another creditor. But it is much more difficult objectively to evaluate such claims.'[278] Due to the fact that not all creditors claim can be satisfied in full by insolvent assets, the law has to decide which creditors are to be paid in full and to what extend others are paid, if at all.[279]

Due to the nature of the insolvency world, it is inevitable that there will be winners and losers. Indeed, 'on insolvency there will be losers and, by and large, these losers will be innocent parties caught up in the insolvent defendant's predicament.'[280] As such, insolvency law has to decide which particular groups of claimants have to bear the losses, and which parties should be afforded greater protection

[274] R Goode "Proprietary Rights and Unsecured Creditors", *op cit* fn 248 at 197.
[275] R Tarling "The resulting trust and the unsecured creditor" (2016) *Company Lawyer,* 1-13, at 3.
[276] P Henton "Rethinking company charge registration: an egalitarian approach" (2003) *UCL Jurisprudence Review,* 1-15, at 1.
[277] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?", *op cit* fn 218 at 85.
[278] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 41.
[279] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?", *op cit* fn 218 at 85.
[280] V Finch and S Worthington "The *Pari Passu* Principle and Ranking Restitutionary Rights", *op cit* fn 227 at 1.

in these giving circumstances. In this respect, from the perspective of the unsecured creditors, the justification that the secured creditors and proprietary claimants do in fact offer sufficient advantages to warrant priority, remains disputable. Thus, 'one might well consider claims to priority allocations of insolvency value to be a great scandal unless they can be normatively justified, by offering sufficient countervailing benefits to the remaining potential participants in the debtor's insolvency.'[281] No matter the situation, it is evident that one party to the insolvency proceedings will be preferred to the detriment of another seemingly innocent party. To this end, retention of title holders are given preferential status which allows them to jump ahead of the queue of competing claims in the event of a buyer's insolvency. A claimant who enters into a contract with a valid retention of title clause has significant bargaining power compared to all the other creditors in a less favourable position, thus meaning that such creditors will have no awareness on whether they will be able to draw out any of the assets in the event of an insolvency. Both secured and unsecured creditors will not be able to predict the value of the assets they might be able to collect from an insolvent party, thus adding to the uncertainty of their precarious position. The hierarchal order enshrined by the *pari passu* principle is thus undermined by the recognition of security and quasi-security devices.

2.2 Justifications for the unfairness

It is evident that bypassing the *pari passu* principle through the recognition of security interests or interests which perform the function of security such as the retention of title clauses, appears to disrupt principles of fairness. The *pari passu* principle affords equality of treatment amongst creditors on the basis of their rights and interests in the company, however, this is disregarded by the recognition of security interests. McCormack writes, 'recognition of security interests appears to clash with a basic fairness principle.'[282] An inherent tension exists between the insolvency principle of *pari passu* and the freedom of contract which enables parties to freely bargain for priority.[283] Evidently, in situations where holders of security interests bypass the pro rata apportion of remaining assets, this results in the remaining creditors essentially losing their equal footing in sharing the insolvency assets. Essentially, unsecured creditors who are without the protection of a security interest, can fail to benefit from their pre-insolvency entitlements, which from the perspective of the disadvantaged creditor can be considered extremely unfair. As noted by Finch, 'the law embracing these [security] devices gives rise to issues inter alia of efficiency and fairness.'[284] It is argued that granting priority to

[281] P Henton "Rethinking company charge registration: an egalitarian approach", *op cit* fn 276 at 1.
[282] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 11.
[283] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 581.
[284] V Finch "Is Pari Passu Passe?", *op cit* fn 243 at 3.

security interest holders, disproportionately shifts the risk to unsecured creditors.[285] In reality, a typical example of an unsecured creditor would be a small trade creditor, who lacks the adequate information, expertise or resources to evaluate risks to strengthen their bargaining power in the insolvency proceedings. One of the main implications of allowing certain groups to bypass insolvency rules of priority, is that in essence a creditor does not obtain the result they originally anticipated, which raises issues or fairness and efficiency.[286] Therefore, the following discussion will provide reasons of why the law permits the taking of security and more specifically, the bypassing the *pari passu* principle.

2.2.1 An insolvency principle with limited scope

One reason for the unfairness is the non-extensive nature of the *pari passu* principle: 'the *pari passu* principle is not as extensive, pervasive and all-embracing in practice as it appears to be in theory.'[287] The *pari passu* principle is supposed to be all pervasive, with the main objective of preventing unfair agreements which go against the default preferred order of priority amongst creditors.[288] It is also thought that forming an order for allocation of assets upon insolvency, through the principle, satisfies the requirement of fairness. The *pari passu* principle provides an orderly list of creditors according to their interests and rights, in the absence of the principle, insolvency proceedings would be on a first come first served basis, regardless of fairness to those with pre-arranged entitlements. However, with the recognition of security interests, the allocation of priority under the principle is severely overlooked as insolvency law has created deviations[289] to the principle, which are in favour of proprietary rights such as holders of retention of title clauses or preferential creditors. As iterated by Bridge, 'when secured creditors are able to eviscerate an insolvent's estate prior to its vesting in the liquidator, one has to ask just how fundamental is the *pari passu* principle.'[290] It has been suggested that the principle is defined by its numerous deviations that enable the bypassing of the principle, which is recognised by law. Thus, 'to allow the use of such [security] devices is not merely to reduce the role of *pari passu,* it introduces principles to override *pari passu.*'[291] Therefore, it is strongly argued

[285] V Finch "Security, Insolvency and Risk: Who Pays the Price?"*, op cit* fn 98 at 633.
[286] S Cantlie "Preferred Priority in Bankruptcy" in J Ziegel, *op cit* fn 272 at 420.
[287] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 11.
[288] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 582.
[289] The author acknowledges that there are a number of exceptions to the *pari passu* principle such as liquidation expenses, preferential debts, set-off, subordination, deferred claims etc. However, as aforementioned a comprehensive account of all these exceptions is beyond the scope of this thesis. For a detailed account see further: V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190, see Chapter 14.
[290] M Bridge "The Quistclose Trust in a World of Secured Transactions" (1992) 12(3) *Oxford Journal of Legal Studies,* 333-361, at 340.
[291] V Finch "Is Pari Passu Passe?", *op cit* fn 243 at 9.

that the *pari passu* principle does not fulfil its attributed function of preventing the disruption of the default order or priority.[292] The principle does not impose specific requirements to be fulfilled, it merely provides a description of what insolvency law does, and as such, it is argued that this 'reduces the principle to triviality.'[293] For such reasons, the principle has been critiqued for being fundamentally hollow as under its remit, creditors from the same corresponding class must be treated equally and the law recognises that there are several different classes of creditors.[294] It is claimed that the principle has a limited effect in allocating distribution as various types of secured claims fall beyond the ambit and the application of the principle.[295] Thus, arguably the array of deviations which allow the bypassing of the principle, results in uncertainty, confusion and substantive unfairness.[296] It is evident that the principle is not quite as important as it is made out to be and potentially fails to fulfil its ascribed function.[297]

It is argued that the principle of *pari passu* does not represent the facts of a real corporate insolvency.[298] The accessibility and ease of creating proprietary interests, has resulted in the common practice of secured creditors seizing the assets of an insolvent debtor to the detriment of ordinary unsecured creditors. A typical case showing this is *Business Computers v Anglo-African Leasing.*[299] The case deals with rights of set off, however the case's background facts, provides a good illustration of how an insolvent's assets are normally distributed in accordance with the different levels of priority. The plaintiff company Business Computers, manufactured computers and financed its operations by obtaining loans from banks which were secured by debentures. The bank insisted that the loans were to be secured by debentures, which subsequently created a floating charge over the assets of Business Computers. Subsequently, Business Computers entered into insolvency, with their assets amounting to £1 million. When Business Computers entered into insolvency, £700,000 was taken by debenture holders and subsequently preferential creditors including the Crown and the rating authorities took £300,000. The trade and unsecured creditors were owed £3 million but got nothing as the insolvent estate was bled dry to satisfy the claims of preferential creditors and those holding proprietary interests, specifically floating charge holders in this case. The defendants, Anglo-African Leasing Ltd had a claim against Business Computers which exceeded £30,000, whilst the defendants owed Business Computers a sum of £10,587.50. The receiver of Business Computers sought payment of the

[292] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 582.
[293] *ibid* at 584.
[294] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 12.
[295] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 92.
[296] V Finch "Is Pari Passu Passe?", *op cit* fn 243 at 10.
[297] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 94.
[298] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 40.
[299] *Business Computers v Anglo-African Leasing* [1977] 1 WLR 578.

debt with interest and Anglo-African Leasing Ltd sought to set-off their claim against the debt. Templeman J's dissatisfaction with this 'depressingly typical[300]' event of secured creditors sweeping off the assets of an insolvent debtor[301], was evident in the following passage:

> 'the question whether in this day and age it is necessary or desirable to permit the Crown and the holders of future floating charges the totality of the priorities which can be exercised under the existing law is not the subject of debate in this court, though I am included to think that it is at least debateable elsewhere.'[302]

It is clear that there is a connection with the hollow reality of the *pari passu* principle and the criticism relating to the ease in which proprietary rights can be created. In particular, the principle is criticised for its hollow ambit as it simply requires the assets of an insolvent debtor to be distributed in line with *pari passu.* The principle does not specify assets belonging to others nor assets which have a proprietary interest. For such reasons, the principle is rarely applied in practice on account of the proliferation of proprietary interests.[303]

2.2.2 Rare application in practice

In recent times, the *pari passu* principle has also been criticised for its ineffectiveness in practice, as in reality it is suggested that company's assets are distributed in a different manner to the *pari passu* principle.[304] Mokal concludes that the principle, 'does not constitute an accurate description of how the assets of insolvent companies are in fact distributed.'[305] In fact, even the Cork Report acknowledged that a rateable distribution amongst creditors in accordance with the principle is very rarely achieved.[306] In addition, empirical evidence has been collated which suggests that in practice, insolvent assets are hardly distributed as per the *pari passu* principle.[307] On account of the widely divergent priorities given to those with security interests or similar, it is claimed that the vast majority of unsecured creditors are in fact left with very little or nothing when it comes the allocation of assets in insolvency proceedings. This is supported by empirical evidence which highlights that 'it is estimated that there are zero returns to them [unsecured creditors] in 88% of [most insolvency cases].'[308] It is

[300] *ibid* as per Templeman J at [578].
[301] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 40.
[302] *Business Computers v Anglo-African Leasing, op cit* fn 299 as per Templeman J at [580].
[303] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 40.
[304] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 12.
[305] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 582.
[306] K Cork, *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 ('Cork Report') para 1396.
[307] See further, R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 589.
[308] *ibid* at 588.

apparent that an overwhelming majority of insolvency proceedings, leave very little or nothing to be distributed to unsecured creditors.[309] Unsecured creditors, the only group of claimants who are heavily subjected to the principle are not even paid *pari passu* in practice*,* on account of the small payable dividends available following the distribution to priority creditors. In the vast majority of circumstances, there is simply not enough residual assets to pay unsecured creditors' claims in full. Indeed, 'unsecured creditors will usually bear the burden of the insolvency of a company as it is they who depend on the fullest extent of the application of the *pari passu* principle.'[310] This is supported by Wood: 'experience has shown that the dividends payable to this group [unsecured creditors], after payment of super-priority and priority creditors, is either nil or some small percentage- often no more than 20 per cent and usually much less.'[311] The common type of unsecured creditors who face such uncertainty include unsecured bank creditors, bondholders and trade creditors who are paid to carry out work or sell goods.[312] Other unsecured creditors include tort claimants or employee pension funds. Unsecured creditors are thus either individuals or small sized traders, groups which are particular vulnerable and commonly lack the resources or influence to alleviate the risk of receiving a small dividend following the distribution of an insolvent estate. The trade creditor is in a weaker position than most other unsecured creditors who have fixed claims in tort or tax, thus meaning that they are more likely to be induced into additional risk: 'it is the trade creditor who places reliance on corporate financial reports who may suffer an increased financial loss as a result.'[313] All this evidence suggests that the *pari passu* principle fails to have successful application of its attributed function in the real world. It is evident that distribution in accordance with the principle is 'non-existent'[314] on account of insolvency law favouring those with security interests or similar status of preferred creditor. It is strongly argued that the principle is less effective in practice as the claim the principle 'governs mostly and – necessarily- constitute something approaching a distributive null set; they are held by those who will not receive anything…if they do received something, it would not be much.'[315] Therefore, the above reasons illustrate the weak nature of the principle in theory and in practice.

The discussion will now turn to the practical implications of the *pari passu* principle for creditors. In line with the earlier discussion, the first rationale concerns the recognition of security rights. The

[309] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 100.
[310] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?", *op cit* fn 218 at 93.
[311] P Wood, *Law and Practice of International Finance: Principles of International Insolvency,* 2nd Edition, London, Sweet & Maxwell, 2007, at 266.
[312] *ibid.*
[313] R Tarling, "The resulting trust and the unsecured creditor", *op cit* fn 275 at 3.
[314] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 589.
[315] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 125.

principle is confined to the assets of a company and accordingly, the law must respect and enforce any pre-arranged entitlements such as the recognition of security rights, before distributing the pool of remaining assets amongst unsecured creditors. The principle is non-applicable and does not affect the following groups; secured creditors including those with fixed charges and/or floating charges over assets, holders of retention of title clauses (most notably suppliers of goods), or any party with proprietary rights to the assets including those who hold the assets on trust.[316] Accordingly, it is evident that a significant group of claimants either are or can be exempt from the application of the *pari passu* principle.[317] In effect, this significantly reduces the amount of assets available for unsecured creditors and thus, offers one explanation of why the *pari passu* principle is less effective in practice.

Goode argues that the assets may be subject to equities for example undue influence or right to avoid a transaction for misrepresentation.[318] He further suggests that the principle is less effective in practice due to the limited amount of residual assets available to be distributed to unsecured creditors. Following the hierarchal distribution process whereby all proprietary rights holders and secured creditors are given their share in the insolvent estate, the remaining residual pool will be very limited to the detriment of any unpaid unsecured creditors. Thus, 'the effect is largely to frustrate a primary objective of the insolvency process and to deprive the general body of creditors any significant interest in the winding up process.'[319] Consequently, the above contentions provides a good indication of why the *pari passu* principle appears to be less effective in practice. It is evident that the principle of *pari passu* is non-extensive as it is subjected to a hierarchy which allows the principle to be set aside or overridden by security interests.

2.2.3 The freedom of contract argument

Another justification for the law allowing the bypassing of the *pari passu* principle concerns the freedom of contract argument. Accordingly, 'judicial recognition of security devices usually proceeds on the basis that such recognition is but a manifestation of freedom of contract.'[320] It is argued that bypassing the *pari passu* by means of incorporating a retention of title clause, is much the same as giving priority to secured creditors, therefore cannot lead to unsecured creditors being treated unfairly.[321] Thus, this argument infers that there can be no unfairness towards unsecured creditors as

[316] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 239.
[317] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 100.
[318] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 239.
[319] *ibid.*
[320] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 37.
[321] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 631.

security has been freely negotiated and contracted for.[322] Retention of title clauses in this instance freely bargained for their right of preference for the super-priority status. Consequently, the freedom of contract argument cites that the retention of title claimants have freely negotiated and bargained for proprietary rights over the insolvent property, whereas the unsecured creditor had the freedom to contract for higher priority, but chose not to.[323] Unsecured creditors are freely entitled to negotiate for a position of superior priority, therefore the risk is on the unsecured creditors for not contracting a better position. The freedom of contract notion was emphasised by Lord Macnaghten in *Salomon v Salomon & Co*[324], 'every creditor is entitled to get and to hold the best security the law allows him to take.'[325] Therefore, according to the freedom of contract argument, a creditor has every right to bargain for security which can advance his status of priority to the detriment of other creditors.[326] As such, the freedom of contract argument provides justification for permitting creditors to benefit in the event of an insolvency as the freedom to contract argument dictates that the parties are merely respecting their proprietary and contractual entitlements.[327]

Additionally, there can be no unfairness as before the winding up process, a creditor is free to pursue any enforcement measures which are available to him.[328] As such, as emphasised by Goode, 'if another creditor chose to lend money or supply goods unsecured, that is his affair; he has no right to complain of being subordinated.'[329] It is fairly assumed that creditors will be aware of the potential risks and can thus insist on measures to aid their position. Creditors can employ measures such as demanding a premium or collateral to protect their unsecured claims or can raise their interest raised to reflect the level of risk involved.[330] Within this very competitive market, creditors are entitled to strengthen their position and subsequently bargain for their right of preference and by not doing so, creditors face the risk of the pool of assets already been drained of all its contents. Evidently, any advance bargaining will subsequently dictate the priorities in insolvency and will increase the chances of creditors getting paid.[331] Therefore, it can be argued that there is no unfairness to unsecured creditors as they are free[332] to contract any rates or terms deemed appropriate to themselves. Therefore, it can be

[322] *ibid.*
[323] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 12.
[324] *Salomon v Salomon & Co* [1897] AC 22.
[325] *ibid* as per Lord Macnaghten at [52].
[326] M Bridge "The Quistclose Trust in a World of Secured Transactions", *op cit* fn 290 at 340.
[327] P Henton "Rethinking company charge registration: an egalitarian approach" *op cit* fn 276 at 1.
[328] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 236.
[329] R Goode "Is the Law Too Favourable To Secured Creditors?", *op cit* fn 242 at 57.
[330] L LoPucki "The Unsecured Creditor's Bargain" (1994) *Virginia Law Review,* 1887-1965, at 1892.
[331] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 601.
[332] The author acknowledges that this may be more difficult for certain groups of creditors such as small trade creditors etc. Please revert to section 1.4.5(c) for a more comprehensive and balanced outlook.

suggested that the different levels of priority during the insolvency proceedings is based on first come, first served basis in relation to bargaining for their contractual rights of preference.

Another variant of the freedom of contract argument focuses specifically on secured credit and property rights. It is argued that the notion of taking security is indistinguishable in its economic effects compared to other financial transactions such as repayment of debts.[333] Accordingly, 'the creditor is providing value and in return is taking security and to deny the creditor that security to its full extent would be to deprive the creditor of something for which it has paid.'[334] This is particular analogous to those taking out security devices, especially the position of retention of title claimants. In order to incorporate a valid retention of title clause within a contract, it is most likely that such holders have to pay a financial sum, albeit in solicitor fees to draft contracts etc. Thus, it is suggested that in order to have gained a higher priority status in the insolvency proceedings and ultimately bypass the ordinary rules of *pari passu,* such holders have paid for their priority to a certain extent.

Unsecured creditors appear to have consented to their inferior status by lending on an unsecured basis in the first place.[335] Consequently, unsecured creditors' implicit consent[336] provides another justification why the law permits the taking of security, regardless of perceived unfairness on behalf of the unsecured creditors. In such a competitive environment with emphasis on bargain and the concept of fair exchange, the burden is on the unsecured creditor to negotiate better terms. Consequently, it can be further argued that a 'creditor who failed to arrange security took the risk of being trumped on corporate insolvency by a secured creditor.'[337] Unsecured creditors can take proactive measures to eliminate the risks they face, such as altering their loan rates.[338] There is also the argument that unsecured creditors are aware of the potential risks they face and as such the burden should be borne by them. This is emphasised by Milman, 'with the widespread dissatisfaction felt by unsecured creditors with the existing legal structure, which frequently offered them only a dividend of a few pence in the pound…It is hardly surprising that any opportunity to subvert the

[333] G McCormack "The priority of secured credit: an Anglo-American perspective" (2003) *Journal of Business Law,* 1-21, at 6.
[334] *ibid.*
[335] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 14.
[336] The author acknowledges that this is not applicable to all types of creditors such as tort victims or voluntary creditors etc.
[337] D Milman "Proprietary Rights on Corporate Insolvency", *op cit* fn 216 at 58.
[338] Examples of possible measures that unsecured creditors can take are referred to in the introduction. See further section 1.5.

existing priority rules would be seized upon with relish.'[339] If certain groups of unsecured creditors are offered the opportunity to improve their priority status, they should do so.

One potential drawback to the freedom of contract argument is to consider the fact that many unsecured creditors will not be in position to take out security such as tort victims or involuntary creditors. In certain circumstances, creditors have no choice in becoming creditors, making their decision completely involuntary and unable to arrange sufficient security measures. Accordingly, they are unable to take account of security arrangements as most commonly they did not choose to become creditors in the first place.[340] As such there is a particular group of creditors who are unable to adjust their rates on loans or by taking security. This is particularly relevant to creditors whose claims to the insolvent estate are comparatively small. In these circumstances, when a claim is moderately small, it may not practical for such creditors to adjust the terms. 'Those whose claims against the debtor's estate are comparatively small as to make it uneconomic to adjust the terms of the extension of credit to reflect the fact that others are taking security.'[341] Most creditors with a relatively small claim often lack the resources or influence to be able to adjust their interest rates accordingly to protect themselves against the increased threat and risk of secured debt, which may or not happen. Such creditors are unable to take precautionary methods to safeguard themselves against potential threats as creditors could incur wasteful financial expenditure. Indeed, these 'non-consensual creditors have, by definition, had no opportunity to bargain with the debtor for protection against the consequences of risk.'[342]

2.2.4 Efficiency of preferential treatment

The priority of secured creditors or holders of retention of title holders, is perceived to be mutually advantageous with strong efficiency considerations.[343] Ensuring and facilitating efficiency[344] and lowering market costs in the insolvency business is of paramount importance. It is argued that 'the collective insolvency regime endeavours to deploy the residual pool of assets in a value maximising manner.'[345] Consequently, those with a higher priority and claim of insolvent assets, will ultimately offset costs to alternative capital structures of the market, thus facilitating efficiency on a reciprocal

[339] D Milman "Proprietary Rights on Corporate Insolvency", *op cit* fn 216 at 64.
[340] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 632.
[341]G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 6.
[342] S Cantlie "Preferred Priority in Bankruptcy" in J Ziegel, *op cit* fn 272 at 419.
[343] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 611.
[344] How economic efficiency is judged is beyond the scope of this thesis. For a comprehensive account see S Schwarcz "The easy case for the priority of secured claims in bankruptcy" (1997) 47(3) *Duke Law Journal,* 425-489.
[345] P Henton "Rethinking company charge registration: an egalitarian approach", *op cit* fn 276 at 1.

cycle.[346] Thus, a mutually advantageous situation occurs where the balance of offsets of costs are achieved, which ultimately benefit the insolvency market as a whole and increases efficiency for secured credit.[347] It is perceived to be most efficient as offsets of gains are then distributed further along to other transactions.[348] Additionally, within the context of retention of title clauses, the clauses allow for the continued use of the assets in the meantime. Thus, by allowing the company to use the assets, the company can produce goods and generate income.[349] Therefore, the efficiency justification argues that in these circumstances, allowing the bypassing of the distribution rules, maximises the aggregate returns to all involved in the insolvency proceedings.[350] It is implied by Cantlie that from an efficiency perspective, that society is burdened by the consequences of resources allocation and subsequently: 'the creditor's failure to extract compensation or protection means that the debtor will not internalise the costs of non-payment to that creditor.'[351] Hence, those afforded with a higher status of priority facilitate levels of efficiency on an economic basis. It is necessary to ensure that the law of security does not adversely affect or unfairly prejudice other creditors. Thus, creditors cannot take out 'a penny more than he put in.'[352] A sufficient degree of fairness and efficiency is guaranteed by insolvency law as to ensure that no creditor overextends or manipulates his other security rights, to the detriment of other innocent involved groups.

The higher status of priority means, that in a vast majority of insolvency proceedings only the secured, post-liquidation and preferential creditors receive anything from the assets of an insolvent party. 'The interests regarded as more worthy of attention (and therefore arguably more important) by the rule-makers are given precedence with respect to particular types of assets, in certain situations, to a specified extent.'[353] Groups of claimants who are afforded higher priority status, either by the parties to commercial transactions or directly by Parliament itself, are regarded as important and accordingly, their claims 'should be met to a significant degree in most insolvencies.'[354]

Unsecured creditors are often left with nothing or very little in the distribution process. For this reason, there is simply no point in wasting resources such as time and money in trying to allocate how

[346] S Schwarcz "The easy case for the priority of secured claims in bankruptcy" *op cit* fn 324 at 429.
[347] *ibid* at 432.
[348] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 15.
[349] G Castellano "Reforming Non-Possessory Secured Transactions Laws: A New Strategy?", *op cit* fn 207 at 617.
[350] V Finch and S Worthington "The *Pari Passu* Principle and Ranking Restitutionary Rights", *op cit* fn 227 at 2.
[351] S Cantlie "Preferred Priority in Bankruptcy" in J Ziegel, *op cit* fn 272 at 420.
[352] R Goode "Proprietary Rights and Unsecured Creditors", *op cit* fn 248 at 186.
[353] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 613.
[354] R Mokal, *Corporate Insolvency Law: Theory and Application, op cit* fn 228 at 123.

unsecured creditors should be ranked. As such, one contention is that it makes commercial sense for unsecured claims to be governed by the *pari passu* principle, as the alternative proposition of having to determine their rankings in terms of fairness and efficiency, would incur significant costs in relation to time, effort and resources and thus would far exceed any benefits.[355] In this regard, it is implied that legal costs, uncertainties and delays are kept at a minimum as the principle does not differentiate unsecured creditors' claims, which consequently avoids the courts deliberating difficult procedural decisions which would be of great expenditure of time, resources and money.[356] Indeed, 'in the end one suspects that the *pari passu* rule has been adopted by courts as a convenient fall-back position that avoids the necessity of making difficult choices where the legislature has failed to take the initiative.'[357] Therefore, it is argued that those holding higher priority through the recognition of security interest or quasi-security interests are justified on the basis that their rights and interests are perceived to be mutually beneficial, albeit in terms of efficiency or fairness.

2.2.5 Stimulates economic activity

The law permits secured creditors such as those afforded proprietary rights over insolvent debts given that secured credit facilitates economic growth.[358] As such there may be consequentialist arguments for allowing the taking of security to the detriment of undermining the *pari passu* principle.[359] As a direct implication of the wide availability of security, loans are encouraged by lenders which facilitates economic activity.[360] In this regard, the economic bargaining power of certain creditors (notably banks) inevitably strengthens from the recognition of security interests.[361] Recognising security rights serves as an impetus for the facilitation of economic growth and development by lowering the overall cost of credit. Secured credit often benefits the borrower and the lender as secured loans tend to bring in lower interest payment compared to the unsecured loan.[362] Thus, creditors and secured transactions enable parties to access credit at a low cost, which financially contributes to the economic market and enables creditors to diversity risk.[363] Accordingly, it is argued that secured credit promotes the extension of credit, of which the economy crucially depends upon.[364] Therefore, the overall accessibility of credit is increased which facilitates the process of raising finances. This can be

[355] R Mokal "Priority as Pathology: The Pari Passu Myth", *op cit* fn 212 at 613.
[356] V Finch "Is *Pari Passu* Passe?", *op cit* fn 243 at 1.
[357] D Milman "Proprietary Rights on Corporate Insolvency", *op cit* fn 216 at 59.
[358] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 15.
[359] G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 7.
[360] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 15.
[361] D Milman "Proprietary Rights on Corporate Insolvency", *op cit* fn 216 at 58.
[362] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 16.
[363] G Castellano "Reforming Non-Possessory Secured Transactions Laws: A New Strategy?", *op cit* fn 207 at 611.
[364] R Goode "Proprietary Rights and Unsecured Creditors", *op cit* fn 248 at 185.

exemplified in practice by banks who exert their status as secured creditors to bypass the *pari passu* principle. Failing to recognise the priority of secured creditors such as banks would have a disastrous impact on the economy in general as it would become exceedingly difficult for businesses to raise capital and purchase property, without the assistance of banks.

Accordingly, it has been implied that secured credit and the notion of security is responsible for the phenomenal growth of the distribution economy.[365] In the insolvency market, whether a creditor deems a credit transaction as profitable is determined on the basis of risks. Thus, taking out security can ameliorate the potential risks and losses a creditor can face as they can increase their interest rates to outweigh any potential losses.[366] This is emphasised by Milman, 'the willingness of English law to permit companies the freedom to grant security in return for loan finance may also be justified on economic grounds in that such security lessened the risk for the borrower and thereby reduced the cost of credit.'[367] As such, permitting certain groups of claimants to secure priority over their fellow creditors is justified as a cost-saving mechanism which facilitates the growth of capitalism in the long run.[368] Therefore, the law permits the taking of security and subsequently allows for the *pari passu* principle to be overlooked as credit serves as an incentive for developing economic activity.

2.2.6 Long established devices

Security devices have been a notable feature of the insolvency world for a long period of time. Their legal longevity suggests their efficiency in this environment. McCormack argues, 'security devices are widespread and pervasive not only in the modern industrialised world but also in ancient societies, and one might ask the rhetorical question why does secured credit persist for so long if it insufficient?'[369] Secured measures such as retention of title clauses are long established within the legal community which serves as a testament to why the law permits taking of security and more specifically, the bypassing the *pari passu* principle. It can be argued that bypassing the *pari passu* principle through measures such as security devices, serves to benefit the more powerful companies. It is the larger and more powerful companies who are in a better bargaining position to incorporate legal devices such as retention of title clauses. As a result of larger company's accessibility to more resources, business connections, financially stable income, they are in a far better position compared to smaller sized companies to be able to incorporate devices, which can bypass the principle of *pari*

[365] M Bridge "The Quistclose Trust in a World of Secured Transactions", *op cit* fn 290 at 341.
[366] G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 7.
[367] D Milman "Proprietary Rights on Corporate Insolvency", *op cit* fn 216 at 58.
[368] *ibid* at 58.
[369] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 26.

passu. A rapid increase of sizable firms relying on secured credit has been noted by academics such as McCormack, who states that firms heavily rely on secured credit as their principal method of financing and developing growth opportunities.[370]

As evidenced above, security devices have been prevalent for a long time and have been deemed efficient within the insolvency environment as such devices facilitate economic and market growth etc. As such, they are regarded as all pervasive as it allows the more powerful companies to not be subjected to the equality rule of *pari passu.* It can be suggested that this area of insolvency law, tends to favour the more powerful companies as they benefit economic interests as whole. Therefore, this offers an alternative explanation of why the law permits the taking of security and allows the *pari passu* principle to be bypassed and more specifically allows the principle to be undermined. It can be further implied, that these security devices which protect the more powerful companies, are essentially designed to promote fairness and efficiency on a wider scale in insolvency proceedings and commercial transactions.

2.2.7 An economic and political motive?

It appears that the law allows security interests and quasi-security interests to override the principle of *pari passu* for political and economic reasons. Certain powerful parties, for example banks are afforded higher priority status in the insolvency distribution allocation. It is questionable whether this is fair. However, there may be economic rationales for such a stipulation. It can be argued that if banks were to have lower priority status, this may lead to economic implications such as making banks more reluctant to lend due to the increased risk or imposing higher interest rates to lend on such a risky basis.[371] Additionally, lowering their priority may lead to secured creditors enforcing more stringent terms in order to lend. All of these implications can have adverse effects on the economy and would burden all other groups involved in the insolvency process as potentially business could be hindered. It is thought that removing banks secured status would result in banks taking alternative defensive measures, which can detrimentally impact smaller businesses.[372] Any of the above implications would have direct negative connotations on small to medium sized business, as banks can take advantage of companies in financial distress. The variety of security devices available to banks ensures that they remain in a powerful position and are able to exert such power over companies during both formal insolvency procedures and informal rescue contexts.[373] If banks were stripped of their higher priority

[370] G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 2.
[371] See generally, R Posner, *Economic Analysis of Law,* 8th Ed, New York: Aspen Publishers, 2011.
[372] G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 2.
[373] *ibid.*

status in insolvency proceedings, they could enforce precautionary mechanisms such as higher interest's rates, adversely impacting a company during its most vulnerable time. Implications of reducing the priority status afforded to creditors was raised by McCormack; '[it would] cause a diminution in the supply and quality of credit offered.'[374]

Accordingly, it can be argued that certain groups of creditors such as secured creditors and retention of title clause claimants are afforded a preferred position in insolvency proceedings as a method of minimising the inevitable social and economic costs of an insolvency.[375] For example, when a company enters liquidation, a wide range of businesses may be owed substantial sums. This can cause exceptionally negative economic implications as illustrated by Keay: 'a liquidation, particularly of large companies, can precipitate financial problems for many of the company's trading partners, can lead to a chain of failed enterprises; this is so-called ripple effect.'[376] As such, prioritising certain groups of creditors ensures that these parties have a greater chance of being protected against the collapse of an insolvent debtor. The impact of liquidation is thus spread across a wide range of groups of creditors, thus facilitating the possibility of creditors being able to continue trading.[377]

A potential solution to this proliferation of priority was suggested by Calnan; he argued that the practical solution was to make it harder to create security in the first place.[378] However, he also raised the issue that restricting the availability of security for credit would have disastrous consequences as it would just make it increasingly difficult to obtain credit. Thus, allowing secured creditors to bypass insolvency priority rules, enables such creditors to a have a degree of economic flexibility. As such, banks and other secured creditors such as retention of title holders are often afforded stronger and more effective security or property rights.

It is evident that banks play a pivotal role during the insolvency of a company, however it is clear that their role is far broader and extends to economic and political motivations. Thus, in attempting to provide a solution to the question of why does the law allow the bypassing of the *pari passu* principle, the answer may be intrinsically connected to economic and political motives, which extend beyond the scope of law. As previously mentioned, banks are powerful players within the insolvency market as they can prevent companies from entering insolvency in the first place. Banks can issue loans to

[374] *ibid.*
[375] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?", *op cit* fn 218 at 94.
[376] *ibid.*
[377] *ibid.*
[378] R Calnan, *Proprietary Rights and Insolvency*, *op cit* fn 219 at 42.

inject financial income into a company in times of facing financial distress. Additionally, banks can encourage or force companies to undergo dramatic changes to prevent the insolvency of a company, such as urging reconstructive suggestions of downsizing or even suggesting the replacement of managers.[379] As such, it is evident that banks have an influence on actions of company, which can lead to a company's unfortunate demise or miraculous recovery. Having such an involved role, means that banks can impact on the economy in many ways. Highlighting their importance within the insolvency world, serves to suggest why certain powerful players such as secured creditors or holders of security interests/ quasi-security interests are allowed to bypass insolvency rules of equality. As such, 'the existence of priorities is predicted on the belief of the legislature that certain persons warrant some form of protection, and should be insulated from the insolvent's financial failure.'[380] Their all-invasive roles have a massive impact on economic implications and also their political prowess in terms of power and influence over companies in the market. Therefore, secured creditors have political repercussions on account of the financial interests, which are inherently at stake.

2.3 Conclusion

Accordingly, there are a variety of reasons which explain and justify why retention of title clauses and similar security devices are afforded super-priority status in the event of insolvency to the detriment of the *pari passu* principle and subsequently, any third parties who share an economic interest in the assets of the insolvent buyer. Evidently, retention of title clauses and wider security interests play an intrinsic role within the commercial market to warrant the circumvention of the insolvency framework and the *pari passu* principle.

However, as will be argued in the forthcoming chapters, the super-priority status afforded to retention of title clauses comes at a stark price as the clauses functional objectives are significantly hindered by the legal minefield in which these clauses operate, exacerbated by the courts' dogmatic and inconsistent approach to dealing with these clauses. Despite the policy justifications for affording retention of title holders with super-priority status, there are inherent uncertainties and difficulties imposed on retention of title clauses in the context of an insolvent company. There are many instances, where the clauses do not offer the expected level of protection to seller's relying on the clauses and as such the fundamental objective of providing an economic lifeline in the event of a

[379] G McCormack "The priority of secured credit: an Anglo-American perspective", *op cit* fn 333 at 4.
[380] A Keay and P Walton "The preferential debts regime in liquidation law: in the public interest?", *op cit* fn 218 at 93.

buyer's insolvency is jeopardised. Even within the context of insolvency proceedings, the statutory moratorium impedes the effectiveness of retention of title clauses as a functional mechanism and exposes claimants to unnecessary setbacks which hinder claimants from repossessing their supplied goods, as will be evidenced in a forthcoming chapter.[381] Regardless of the super-priority status afforded to retention of title clause claimants, the functional objectives of such clauses are hindered by a broad range of factors, exasperated by significant legal uncertainty and the courts' general reluctance to enforce retention of title claims. Evidently, all that glistens is not gold in the context of retention of title clauses, and the subsequent chapter illustrates the issues of terminological uncertainty. Difficulties with terminology and definitions poses significant and conceptual problems from the outset for retention of title clauses.

[381] This discussion will be developed further in Chapter 6 where a discussion on how the statutory moratorium exposes retention of title claimants to unnecessary setbacks and further complications.

CHAPTER 3: TERMINOLOGICAL UNCERTAINTY OF TITLE

3. Introduction

It is widely recognised that a retention of title clause carries out a double function, one function relating to security and the other to sale.[382] Despite the apparent duality, both functions rely on the fundamental objective of the clause, which is to retain legal ownership or title of the goods. The common commercial practice of retaining legal ownership of the goods supplied, is instrumental in affording suppliers of goods sufficient protection in the event of a contractual buyer's insolvency. The popularity and proliferation of retention of title clauses in commercial contracts of sale arguably, reflects an omission of the current law in failing to adequately protect creditors. The incorporation of a right of ownership by means of a retention of title clause attempts to fill the void where legislation fails to implement sufficient protection for creditors. By means of incorporating a retention of title clause in the contract of sale, an otherwise unpaid seller can reserve ownership in the goods and be afforded priority in the insolvency proceedings. Without this level of protection bestowed by the title retaining provision, the unpaid seller would be denied preference in priority in the insolvency proceedings and would only be able to satisfy an insolvency claim, after secured creditors have satisfied their claim in full.

Conceptually, for retention of title clauses to effectively operate and provide the necessary protection to the seller, the seller must retain title of the goods, thus retaining legal ownership. Of equal importance, the buyer must be conferred sufficient rights to be able to use the goods, before the full purchase price has been paid, in order for a retention of title clause to be contractually and 'commercially workable.'[383] Accordingly, under the scope of a retention of title clause, both the seller and buyer fundamentally rely on the concepts of 'title' and 'ownership'. Therefore, the concept of legal ownership is of prominent importance when dealing with retention of title clauses. Additionally, title as a concept is considered fundamental to ensure a detailed understanding of the proprietary nature of the relevant Sale of Goods legislation.[384] Evidently, one must understand the concepts of title and ownership, to understand how retention of title clauses function in practice.

[382] For further discussion on this see section 5.2 and 5.3 which discusses whether this contention is still accurate following the decisions in the cases of *Wilson v Holt* and *Bunkers* respectively.
[383] S Worthington, *Proprietary Interests in Commercial Transactions*, *op cit* fn 11 at 7.
[384] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", (1972) *The Modern Law Review,* 268-288, at 288.

It can be claimed that the effectiveness of a retention of title clause is severely hindered by the relevant legislation failing to define key concepts pertinent to this area of law and that the current legislation fails to reflect the modern environment in which these clauses operate. Accordingly, this chapter will explore some of the common problems associated with the lack of definitions contained within the Sale of Goods Act 1979 and how this creates significant legal uncertainty and confusion. The discussion will also highlight notable problems in relation to the concepts of title and ownership and the subsequent implications for retention of title clauses. As such, the purpose of the following discussion is to illustrate the difficulties with terminological and definitional accuracy. This is important to discuss within this thesis in order to illustrate some of the fundamental weaknesses of this area of law, which hinders the functional objectives of the clauses from the onset. It is argued that the terminological uncertainty originating from the Sale of Goods Act, significantly contributes to the inception of the minefield of legal issues associated with retention of title clauses.

3.1 Title

As the focus of this thesis is retention of title clauses and title is implicit in understanding the legal doctrine, it is thus imperative to ascertain what is meant by title. Accordingly, the following discussion will provide a general overview of what exactly is meant by title and consequently attempts to navigate through the nuances in application and meaning of title. Title is a relative concept which bears different interpretations and meanings. The definition of title is an elusive concept as the meaning of title varies within the context it is used.[385] In accordance with this, 'title may be enforceable against X but not necessarily against Y. The reason for this is that title is generally a relative concept and must be measured relative to other facts, which may lead to a different conclusion in law.'[386] It is evident that over the years various proponents have advanced different accounts of what is meant by title.[387] It is suggested that the fundamentally different accounts of the meaning of title is caused by the various ways that title is used in law, which further contributes to the mass confusion.[388] It is instructive now to discuss the meaning of title. In order to provide a holistic approach to what is meant by title, it is possible to categorise the understanding of title in three ways. The concept of title can be equated with popular conception of ownership, legal ownership or legal right.[389]

[385] D Fox "Relativity of title at law and in equity" (2006) *Cambridge Law Journal,* 1-22, at 2.
[386] S Panesar, *General Principles of Property Law*, Harlow: Pearson Education Limited, 2001, at 139.
[387] See generally, H Ho "Some Reflections on Property and Title in the Sale of Goods Act" (1997) 56 (3) *The Cambridge Law Journal,* 571-598.
[388] L Rostill "Relative Title and Deemed Ownership in English Personal Property Law" (2014) *Oxford Journal of Legal Studies,* 31-54, at 32.
[389] S Panesar, *General Principles of Property Law, op cit* fn 386 at 139.

Firstly, the concept of title can be understood with reference to the popular conception of ownership, which bears wider legal connotations. In this instance, if a person has ownership then it equates to them having title to the subject-matter of his ownership.[390] Equating title to ownership is regarded as a much more general approach and encompasses definitions found in different areas of law. For example, title holds a specific meaning for land registration under the remit of the Land Registration Act 2002, in which title is conferred upon a proprietor through different levels of guarantee such as having an absolute, qualified or possessory title.[391] To this extent, title is understood by the common popular notion of ownership. Arguably, this conception of ownership is concurrent with the view that ownership is and ought to be exclusive. Hence, 'exclusion is one very import tool for enabling owners to exercise their authority effectively.'[392]

Secondly, title is understood by common legal understanding. To this extent, the concept of title can also be used synonymously for legal ownership and possession such as the right to physically use the property, the right to obtain income from the property and the right to manage it.[393] This is emphasised by Lawson and Rudden who state: 'title is a shorthand term used to denote the facts which, if proved, will enable a plaintiff to recover possession or a defendant to retain possession of a thing.'[394] According to this viewpoint, the law regards a person who has possession of a certain good as its owner, thus indicating that the person has a title to the ownership of the certain good in question.[395] To this end, ownership and possession are interlinked.

Thirdly, title can refer to a legal right. In this context, title is identified as a claim to a bundle of rights which are associated with ownership of a specific thing.[396] Accordingly, 'the classical analysis of title demonstrates that title is the set of facts upon which a claim to some legal right, liberty or power, or legal interest is based.'[397] Interpreting this view of the doctrine of title, multiple ownerships can exist in reference to the same chattel. This account of title enables multiple persons to have rights, powers or interests, which constitute or partly constitute, ownership.[398] In this instance, title can refer to a

[390] S Panesar, *General Principles of Property Law, op cit* fn 386 at 139.
[391] D Fox "Relativity of title at law and in equity", *op cit* fn 385 at 2.
[392] L Katz "The Concept of Ownership and the Relativity of Title" (2011) 2(1) *Jurisprudence,* 191-203, at 197.
[393] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 8.
[394] F Lawson and B Rudden, *The Law of Property,* 3rd Ed, Oxford: Clarendon Press, 2002, at 44.
[395] L Rostill "Relative Title and Deemed Ownership in English Personal Property Law", *op cit* fn 388 at 35.
[396] H Ho "Some Reflections on Property and Title in the Sale of Goods Act", *op cit* fn 387 at 571. See also R Hickey, *Property and the Law of Finders,* Oxford: Hart Publishing, 2010, at 165.
[397] S Panesar, *General Principles of Property Law, op cit* fn 386 at 139.
[398] L Rostill "Relative Title and Deemed Ownership in English Personal Property Law", *op cit* fn 388 at 36.

claim arising out of a proprietary interest. It is important to note that title does not refer to the actual content of the claimant's proprietary interest meaning his practical enjoyment conferred by the interest, merely it relates to the claimant's strength of claim.[399] The claimant's strength of claim to the practical enjoyment is relative to other potential claimants holding similar interests in the same asset. Accordingly, a fundamental notion of title is ascertaining whether an individual's claim to the asset is stronger or weaker than other claims made by potential claimants. Thus, courts must determine which of the contesting claimants has the better possessory title rather than ascertaining who is the true owner.[400] Title is also understood in a technical manner by reference to a specific statute and ascertaining what implicit meaning does the statute refer to. The relevant statutory provisions for retention of title clauses are found in the Sale of Goods Act 1979, which fail to define the concept of title or ownership. This illustrates the difficulty in inferring a particular meaning of title without the assistance of an explicit definition provided by the relevant statute.

3.2 Elusive nature of ownership

The same criticisms can be applied to the concept of ownership as one of the most fundamental difficulties with this area of law, is that the concept of ownership is deemed elusive. The elusive nature of ownership is heightened further on account of the failure of the Sale of Goods Act 1979 to define the term 'ownership'. Similarly, a definition of ownership cannot be found in Blackstone, which fails to mention ownership as a juridical concept.[401] The only definition found in the Sale of Goods Act relates to property under section 61 which states that property is defined as the general property in the goods and not relating to special property. However, this definition does not provide us with the necessary guidance to define title or ownership with absolute certainty. On account of the Sale of Goods Act failing to provide definitions for title or ownership, it is thought that 'general property' and 'ownership' are used synonymously. This is supported by Davies who notes that 'it may be that general property' and ownership are treated as coterminous.'[402]

Accordingly, it is now imperative to consider the reasons why the Sale of Goods Act does not use the concept of ownership directly. It is suggested by Lowe that the Sale of Goods Act does not use the concept of ownership on the basis of historical reasoning.[403] On account of the relative nature of

[399] D Fox "Relativity of title at law and in equity", *op cit* fn 385 at 2.
[400] M Bridge "Property, Title and Debt in Sale of Goods" (2017) 29(1) *National Law School of India Review,* 21-33, at 23.
[401] I Davies, "Transferability and Sale of Goods" (1987) *7 Legal Studies 1,* 1-38, at 2.
[402] I Davies, *Effective Retention of Title, op cit* fn 6, at 2.
[403] See R Lowe, *Sale of goods and hire-purchase,* 2nd Ed, Middlesex: Penguin Books Ltd, 1972, at 11.

English law and the fact that ownership is such an elusive concept, such a combination would employ much uncertainty to this area of law.[404] Panesar argues that the concept of ownership is plagued by conceptual problems and as such it is difficult to refine ownership into one singular notion.[405] Indeed, the concept of ownership is usually tied with the concept of possession, which again may explain why the Sale of Goods Act does not define nor clarify the concept of ownership. Despite the intention of the Act seeking to avoid uncertainty, arguably the lack of definitions generate their own set of inconsistencies and confusion.

However, it is evident that much uncertainty has been brought on by the lack of comprehensive definitions and that the definitions employed by the Act give rise to some serious definitional problems as will be discussed below.[406] Davies emphasises the common confusion associated with the terminology employed by stating; 'the close connection between the idea of ownership and the idea of things owned- demonstrated by the use of the word 'property' to designate both- has caused confusion.'[407] According to Davies, a functionalist and simplistic account of ownership should not be endorsed as such approaches may not be widely recognised in the context of sale of goods, with the exception of lawyers.[408] Therefore, it can be argued that including a definition of ownership within the Sale of Goods Act would be advantageous as it would open the scope of understanding to a wider audience, extending beyond the remit of lawyers exclusively. Arguably, under the present regime, the concept of ownership is difficult to comprehend due to the wide connotations associated with it.

3.3 Terminology employed by the Sale of Goods Act

3.3.1 Use of ordinary words

The perplexity of retention of title clauses is exacerbated by the failure of the Sale of Good Act to define the concepts of title and ownership. Terms associated with retention of title clauses, notably, 'ownership', 'title' and 'property' are used interchangeably which often causes significant confusion. As will be illustrated, the employment of the terms in such close proximity invites notable problems. It is evident by the forthcoming examples that these different terms are used inconsistently, which further contributes to the existing legal uncertainty. This issue is exacerbated by the choice of terminology used by the Sale of Goods Act 1979 (hereafter Sale of Goods Act). The Sale of Goods Act

[404] E McKendrick et al, *Sale of Goods,* London: LLP Professional Publishing, 2000, at 28
[405] S Panesar, *General Principles of Property Law, op cit* fn 386 at 113.
[406] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 28.
[407] I Davies, *Effective Retention of Title, op cit* fn 6 at 2.
[408] I Davies, "Transferability and Sale of Goods", *op cit* fn 401 at 2.

has the apparent advantage of using ordinary words to convey and formulate the legal rules.[409] However, using ordinary words to formulate legal rights can be regarded as a weakness of the sale of goods legislation as 'in this way the strength of the legislation can sometimes be its principal weakness because the ordinary words may carry a special legal meaning.'[410] Within the context of the Sale of Goods Act, a particular term could infer a number of different meanings, all of which could have slightly different legal connotations or legal significances. This particular problem of inferring different legal meanings is exemplified by the use of the term 'property' in the Sales of Goods Act 1979, which will be highlighted further below. It is now instructive to provide an overview of the relevant sections of the Sale of Goods Act to facilitate understanding.

The Sale of Goods Act 1979 is divided into two groups of sections. Sections 16-20 deals with the 'transfer of property as between seller and buyer', whereas sections 21-26 are grouped under 'transfer of title.'[411] Section 61 defines property as the general property in the goods, which does not merely relate to a special property.[412] It must be noted that neither 'general property' nor 'special property' is defined by the Act, which means that meaning must be inferred from the common law. This definition has been criticised for being overtly weak and lacking specificity, as such the current definition fails to provide a comprehensive understanding of what is meant by property.[413] Accordingly, 'the definition of general property in the Goods Act like so many statutory definitions is very basic and a fuller and satisfactory definition has proved elusive.'[414] However, as noted by McCormack, the language adopted by the relevant legislation differs from common practice.[415] It is stated that property in the goods usually refers to the rights of ownership, which denotes a wider audience of participants, whereas title to the goods, is generally adopted as to refer to the legal rights that pass between seller and buyer.[416] So from the onset, there is a variance between common understanding of terminology and the terminology asserted by the Sale of Goods Act. On account of the apparent failings of section 61 to define property, one must infer meaning from the context of the Act itself or by the use of common law.[417] It has been implied that general property is synonymously

[409] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 4.
[410] *ibid* at 5.
[411] G McCormack, *Reservation of Title, op cit* fn 33 at 8.
[412] See, Section 61 of Sale of Goods Act 1979.
[413] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 288.
[414] N Franzi "Sale of Goods, Implied Undertaking as to Title" (1980) *Western Australian Law Review,* 208-236, at 213.
[415] G McCormack, *Reservation of Title, op cit* fn 33 at 8.
[416] *ibid.*
[417] H Ho "Some Reflections on Property and Title in the Sale of Goods Act", *op cit* fn 387 at 577.

associated with ownership, whereas special property refers to a lesser interest.[418] It has also been suggested that general property can be identified as an ownership interest and connected with the concept of an absolute interest.[419] Hence, it can be argued that the definition of property requires further clarification as it is obvious that the current definition of property under the Act 'informs us only of the extent to which the seller must relinquish his interests in the goods to the buyer.'[420]

3.3.2 Inferring meaning from the common law

The common law does not provide a definite nor a comprehensive account of the concepts of ownership and property.[421] Accordingly, 'since the physical, legal and moral conditions of excludability may vary according to time and circumstance, it becomes clear that the notion of property in a resource is not absolute, but relative.'[422] It is argued that the common law approach to the analysis of proprietary rights is far less structured than in civil law jurisdictions.[423] The common law approach to the term property has been branded feudal in nature, which intermixes different legal categories such as property, contract, tort, equity and real and personal remedies.[424] The common law approach to the concepts of ownership and property is deemed an increasing problem in practice. This is supported by Katz who argues that 'the common law lacks a legal concept of ownership and deals instead in rights to possession of varying strength.'[425] Arguably, this is an increasing problem within the commercial sector as transactions are often expressed in terms which are conditional or split ownership and security interests.[426] In reality, the legal implications and consequences of such stipulations are left unexplored until a legal dispute arises and forces the court to provide a suitable solution. Often, the solution provided by the courts is a piecemeal approach, which leads to inconsistent and inadequate decisions. Thus, it is suggested that the common law approach produces an incoherent body of law, which fails to achieve consistent outcomes. This piecemeal approach to legal doctrines, can be found in the context of retention of title clauses, as this area frequently generates changing body of case law, where particular clauses are liable to be rendered ineffective by the decisions of the court, making it impossible to achieve a sense of coherency.[427]

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[418] H Ho "Some Reflections on Property and Title in the Sale of Goods Act", *op cit* fn 387 at 578.
[419] See further, R Hickey, *Property and the Law of finders,* Oxford: Hart Publishing, 2010, at 166.
[420] H Ho "Some Reflections on Property and Title in the Sale of Goods Act", *op cit* fn 387 at 578.
[421] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 1.
[422] K Gray "Property in Thin Air" (1991) *Cambridge Law Journal,* 252-307, at 295.
[423] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 1.
[424] G Samuel "Property Notions in the law of obligations" (1994) 53 *Cambridge Law Journal,* 524-545, at 527.
[425] L Katz "The Concept of Ownership and the Relativity of Title", *op cit* fn 392 at 191.
[426] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 1.
[427] The incoherent and piecemeal approach by the courts is discussed at length in Chapter 5.

At common law, there is a great impetus for legal property rights in a chattel to be divided into the context of ownership and possession.[428] However, it important to note that 'possession, whether in the popular or in the legal sense, does not necessarily concur with title.'[429] In the context of the Sale of Goods Act, it is important to note that the general property in the goods is separate from possession of goods. Even if the property in the goods has passed to the buyer, this does not confer the buyer with possession nor the right to possession against the seller.[430] Additionally, the property in the goods can pass before possession. As such, it is not possible to adopt the common law approach to ownership which corresponds to possession. Accordingly, as summarised by Canavan et al: 'the Act itself precludes the adoption of this view because it lays down the clear rule that the buyer's right to possession depends either on payment of the price or on the granting of credit, not on the passing of the property.'[431] The mere fact that property has passed successfully to the buyer does not equate to conferring the buyer title the goods against the whole world not the right to possession as against the seller.[432] Therefore, the fragmented approach taken by the courts and the unsuitability of ownership corresponding to possession under common law, does little to infer meaning of ownership and property in the context of the Sale of Goods Act.

3.3.3 Inferring meaning from the Act itself

Despite the limited definition of property as provided by section 61, generally, there is little difficulty in understanding the term 'property' as it can be inferred from the Sale of Goods Act to mean the entirety of the rights of the sale goods, held by the seller and transferred to the buyer.[433] The distinction between 'title' and 'property' within the context of the sale of goods activity has been advocated by Battersby and Preston.[434] Indeed, Battersby states 'the use of [the property] concept in the Sale of Goods Act shows that it means the totality of the rights over the sale goods enjoyed by the seller and which by the sale will be transferred to the buyer.'[435] It is argued that the terminology employed by the Sale of Goods Act was consciously chosen for mere linguistic purposes by Chalmers

[428] L Merrett "The importance of delivery and possession in the passing of title" (2008) *Cambridge Law Journal,* 1-13, at 4.
[429] P Pollock and R Wright, *An Essay in Possession in the Common Law,* Oxford: Clarendon Press, 1888, at 2.
[430] L Merrett "The importance of delivery and possession in the passing of title", *op cit* fn 428 at 4.
[431] C Twigg-Flesner and R Canavan, *Atiyah and Adams' Sale of Goods,* 13th Ed, Harlow: Pearson Education Limited, 2016, at 241.
[432] *ibid.*
[433] G Battersby "A reconsideration of 'property' and 'title' in the Sale of Goods Act" (2001) *Journal of Business Law,* 1-9, at 5.
[434] See further, G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384.
[435] G Battersby "A reconsideration of 'property' and 'title' in the Sale of Goods Act", *op cit* fn 433 at 5.

who originally drafted the 1893 Act.[436] Hence, it is possible to infer meaning of property from what is provided by the Act itself. To exemplify this point, Battersby considers retention of title clauses and their purpose of retaining title until a specific requirement has been fulfilled, most commonly the full payment of purchase price.[437] Following the exact terminology of the Sale of Goods Act and inferring its meaning, Battersby argues that 'such clauses would be called reservation of property clauses…however, that is obviously a mere linguistic point, nothing of substance turns on it…providing that the meaning could be discerned from appropriate definitions or from the context.'[438] Accordingly, the Sale of Goods Act provides wide discretion in inferring meaning beyond the literal interpretation of the terminology employed within the Act. This can be evidenced by the use of title within the context of the Sale of Goods Act to mean the various circumstances in which a buyer may become the owner of the goods.[439]

In order to ensure a comprehensive and mutual understanding of property in the context of the Sale of Goods Act, it has been suggested by Battersby that the analogous 'transfer of property' should be elaborated further to reduce confusion.[440] As we have seen, property is used within the Act to refer to the nature of the seller's ownership of the goods and the term is also used in reference to the exact time when ownership is transferred from seller to buyer under a contract of sale.[441] As such, the term is used to indicate the transfer of property between seller and buyer. Accordingly, Battersby and Preston suggest that the phrase transfer of property should be expanded to infer a comprehensive explanation of what it entails, specifically 'the transfer of such-and-such a title to such-and-such an interest.'[442] The distinction between title and property has been deemed fundamental by McClure et al, on the basis that the English system is one of competing titles.[443] It is thus argued that, expanding the concept of property would rectify the current failings of section 61 which asserts a limited meaning to property.[444] Perhaps adopting this expanded approach to the transfer of property would simultaneously convey the appropriate meaning and arguably, provide clear conceptual structure to this area of law, and subsequently, clarifying some of the conceptual uncertainty surrounding

[436] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 5.
[437] G Battersby "A reconsideration of 'property' and 'title' in the Sale of Goods Act", *op cit* fn 433 at 5.
[438] *ibid.*
[439] *ibid.*
[440] *ibid.*
[441] E Baskind, G Osborne and L Roach, *Commercial Law,* 3rd Ed, Oxford: Oxford University Press, 2019, at 232.
[442] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 270.
[443] L McClure et al "The History of a Hunt for Simplicity and Coherence in the field of 'ownership', 'possession', 'property' and 'title'" (1992) *The Denning Law Journal,* 103-136, at 109.
[444] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 288.

retention of title clauses. However, in attempting to provide a solution to the criticism of the section 61 definitions, Davies cautions the approach of providing a rigid application of property as such strictness would in his view restrict negotiability or transferability of goods.[445] It is clear that the definitional issues surrounding the transfer of property are highly technical and complicated and indeed contribute to this area of law being presented as a legal minefield of uncertainty.

3.3.4 Difficulties relating to the transfer of property

The terminology employed by the Act in reference to property has been criticised for being overly curious as 'the Act talks of a transfer of property as between seller and buyer, and contrasts this with transfer of title.'[446] The concept of transfer of property poses serious questions in attempting to identify which individuals have ownership rights and specifically ownership rights over what exactly.[447] It has been noted that property rights possess a distinguishing feature in which such rights binds immediate parties and all third parties to a certain transaction. Thus, property is given an anomalous meaning as property rights can affect third parties.[448] Following this assumption, proponents such as Atiyah question the existence of transferring and retaining title between a seller and buyer and the terminology of the relevant legislation.[449] It is argued that such an action should lead to two alternatives, which are summarised as follows: transfer of property should relate to a mere transfer of duties amongst seller to buyer, or a transfer of property should not be exclusive to simply a buyer and seller as such ramifications hold the potential to affect wider participants.[450] Therefore, under this line of reasoning, Atiyah suggested that 'title' and 'property' have different meanings. Accordingly, 'under the Act, the passing of possession of the goods is said to affect only the relations of the parties between themselves, whereas the passing of title in the goods binds third parties.'[451] In summation, this raises the question of how can there only be a transfer of property between a seller and buyer? Either there is merely a transfer of rights as between the seller to the buyer, or there is a transfer or property which can impact the whole world.[452]

Thus, those proponents set against the transfer of property between seller and buyer are doing so on the basis that transfer of property should not be exclusive to the category of buyer and seller.

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[445] I Davies, *Effective Retention of Title, op cit* fn 6 at 2.
[446] P Atiyah, J Adams and H MacQueen, *The Sale of Goods,* 11ed, Harlow: Pearson Longman, 2005, at 315.
[447] I Davies, *Effective Retention of Title, op cit* fn 6 at 3.
[448] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 276.
[449] P Atiyah, *The Sale of Goods,* 8th Ed, London: Longman, 1990, at 281.
[450] *ibid*. See also G McCormack, *Reservation of Title, op cit* fn 33 at 8.
[451] I Davies, *Effective Retention of Title, op cit* fn 6 at 5.
[452] C Twigg-Flesner and R Canavan, *Atiyah and Adams' Sale of Goods, op cit* fn 431 at 241.

Therefore, the interpretation of the Act raises doubts on whether the transfer of title is exclusive to the category of mere buyer and seller or extends to the wider world.[453] This is supported by Davies who suggests that the terminology title and property in the Sale of Goods Act have two completely different meanings: 'under the Act, the passing of property is said to affect solely the relations of parties inter se whereas only the title passage provisions bind third parties since the latter assumes delivery or retention of de facto possession.'[454] It is clear, that this particular area of law is still riddled with confusion.

Despite the fact that it is generally accepted that there is little difficulty in understanding the concept of property as a singular concept, providing further clarification would be beneficial in ensuring consistency and clarity of meaning. By failing to define such key concepts, the application of the Act is heavily context dependent which can lead to a number of practical problems as discussed below. The most notable problem is that at present, clarification can only be provided on a piecemeal basis through the process of disputes reaching the courts. As there is no overarching guidance, it is increasingly difficult to interpret such concepts holistically, which leads to matters of inconsistencies. In the context of retention of title clauses, any clarification of the law is contingent on particular disputes reaching the courts and as such, any development of the law is stifled by this reactive and fragmented approach.

3.4 Consequences of failing to define key terms

There are clear ramifications of failing to define fundamental concepts within the Sale of Goods Act 1979. The absence of any statutory definition of the terms: ownership and title, in the Sale of Goods Act equates to the concept being understood 'only against the background of the general law of property in the goods.'[455] Thus, the omission of providing concise and comprehensive definitions, is regarded as severely problematic as it opens this area of law to slight variances and inconsistencies. Llewellyn emphasises that failing to define these key terms leads to further uncertainty on a case by case basis, as it results in the following pragmatic issues:

'Title, worked out commonly in a situation where its application fitted the issue well enough, is either (1) applied blindly to situations in which a different implication is concerned, with regrettable

[453] See further; G McCormack, *Reservation of Title, op cit* fn 33 at 8.
[454] I Davies, "Transferability and Sale of Goods", *op cit* fn 401 at 5.
[455] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 268.

consequence, or (2) is sleight-of-handed into inconsistent use in the new situation, to achieve a consequence deemed desirable.'[456]

As such, it can be argued that courts are hindered from providing certainty and consistent reasoning for retention of title cases due to the lack of definitions within the relevant legislation. The lack of definitions exacerbates the ambiguity surrounding the terms, consequently necessitating the need to pose further questions to ascertain the content of the terms.[457] Arguably, this can weaken the utility of the terms from the onset and leads to nuances in application. Evidently, retention of title clauses are subjected to the piecemeal approach adopted by the courts, which invariably leads to an unwieldly mass of case law to clarify the exact position of the law in relation to title.

One possible solution to defining title is put forward by McCormack who writes, that title to the goods should be held synonymously with the rights that pass between seller and buyer.[458] To this extent, the concept of title should not be overcomplicated as passing of property only comes into effect when the seller enters insolvency and 'the buyer whom property has passed will have a good title against the liquidator.'[459] Accordingly, it is put forward that including relevant definitions within the Act will bring much needed coherence to this area of law and dispel some of the existing difficulties with retention of title clauses.[460]

3.5 Relevance to retention of title clauses

The concept of property holds significant importance in the context of the Sale of Goods Act. The omnipotence of the concept of property is exemplified by the need to locate property in the goods for a variety of different reasons. Such reasons are summarised by the following statement: 'the location of property in the goods is also important for other purposes such as the passage of risk from seller to buyer, the availability to the seller of the action for price and the ability of a buyer to recover the price from the seller on the ground that there has been a total failure of consideration.'[461] However, the notion of property is considered fundamental for the purposes of retention of title clauses, whereby the location of property in the goods is imperative in the event of one party entering insolvency proceedings.

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[456] K Llewellyn "Through Title to Contract and a Bit Beyond" (1938) 15 *New York University Law Quarterly Review,* 159-209, at 172.
[457] R Hickey, *Property and the Law of Finders, op cit* fn 419 at 166.
[458] G McCormack, *Reservation of Title, op cit* fn 33 at 8.
[459] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 277.
[460] *ibid* at 268.
[461] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 30.

3.5.1 Meaning of ownership by reference to case law

Ownership is equally as important for the context of retention of title clauses. The meaning of ownership was raised in the case of *Clough Mill Ltd v Martin.*[462] Clough Mill were in the business of selling yarn, it contracted to supply yarn to a company named Heatherdale Fabrics Ltd, a manufacturer of fabric. The contracts of sale included a retention of title clause which stipulated:

'The ownership of the material shall remain with the seller, which reserves the right to dispose of the material until payment in full for all the material has been received by it in accordance with the terms of the contract or until such time as the buyer sells the material to its customers by way of bona fide sale at full market sale.'[463]

In summation, the retention of title clause stated that ownership of the yarn should remain with the seller Clough Mill, who reserved the right to dispose of the yarn until payment was received in full. In construing the retention of title clause in the contract of sale, the first point to consider was what was being reserved by the seller. In this instance, the ownership of the material supplied under the particular contract was being reserved, specifically the supply of yarn. The meaning of ownership was raised by Robert Goff LJ who stated that 'prima facie, in a commercial document such as this, ownership means, quite simply, the property in the goods.'[464] Therefore, the condition of the contract of sale purported that Clough Mill would remain owner, but could only exercise his power of owner to the terms, albeit express and implied of the contract. However, Oliver LJ took a different approach to the meaning of ownership. He clarified that the condition of the retention of title clause stating 'the property…shall be and remain' should not bear a literal interpretation. He continues:

'They necessarily import the creation by the buyer of a proprietary interest in the plaintiff and thus, since the proprietary interest is by way of security, a charge. Therefore, it is argued if property here means, as in effect it must equitable property resulting from a charge, the words ownership of the material in the first sentence of the claim must have a corresponding meaning of equitable ownership.'[465]

Accordingly, the *Clough Mill* case provides two possible interpretations of what is meant by ownership. One citing that the meaning of ownership equates to the property in the goods, whilst the other states that it must refer to an equitable ownership. The implications of an equitable ownership will be discussed subsequently.

[462] *Clough Mill Ltd v Martin, op cit* fn 45.
[463] *ibid* at [113].
[464] *ibid* as per Robert Goff LJ at [115].
[465] *Clough Mill Ltd v Martin, op cit* fn 45 as per Oliver LJ at [124].

3.5.2 Equitable ownership

In order to provide clarification, equitable ownership will now be discussed. Equitable ownership confers a financial interest in the property. The most common circumstance where an equitable ownership may arise is from a trust.[466] In such a circumstance, it possible for the trustee to hold the legal ownership for the benefit of another and thus, the equitable ownership is subsequently vested in the beneficiary.[467] In the context of the Sale of Goods Act, Goode implies that until the legal ownership (property in the goods) has passed to the buyer pursuant to the terms of the contract of sale, a mere personal contractual right exists to call for the transfer to be made.[468] He continues: 'so whereas an agreement for a mortgage usually constitutes an equitable mortgage and an agreement for the sale of land makes the vendor a trustee for the purchase, an agreement for sale of goods does not of itself vest equitable ownership to the buyer, or indeed, confer any real right on him at all.'[469]

In light of equitable ownership and retention of title clauses, the case of *Re Bond Worth*[470] is particularly informative and merits discussion. *Re Bond Worth* contained different set of contractual terms within the contract of sale of fibre, which purported that the equitable and beneficial ownership would remain with the seller until the payment of the full purchase price was made. Accordingly, the retention of title clauses purported to transfer the legal ownership to the buyer, whilst the seller retained equitable and beneficial ownership of the goods, which was fibre for the manufacturing of carpets. Therefore, this meant that the retention of title clause in question, purported to govern the equitable and beneficial ownership rather than the legal ownership, asserting that the legal ownership passed on delivery. In reference to ascertaining the meaning of equitable and beneficial ownership, Slade J made the following statement:

'The court is not entitled to discard the plain ordinary meaning of the phrase equitable and beneficial ownership unless there can be found in the relevant contracts other langue and stipulations which necessarily deprive it of its ordinary meaning. The court, however, is entitled and indeed bound to look at the substance of the transactions as appearing from the wording of the whole of the retention of title clause.'[471]

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[466] R Goode, *Proprietary Rights and Insolvency in Sales Transactions,* 2nd Ed, London: Sweet & Maxwell, 1989, at 5.
[467] S Panesar, *General Principles of Property Law, op cit* fn 386 at 124.
[468] R Goode, *Proprietary Rights and Insolvency in Sales Transactions, op cit* fn 466 at 6.
[469] *ibid.*
[470] *Re Bond Worth* [1980] Ch. 228.
[471] *ibid* as per Slade J at [248].

As such Slade J clarified that a retention of title clause could not retain equitable ownership, rather a legal owner can only retain legal title to the goods.[472] Slade J asserted that a legal and beneficial owner of an asset cannot retain title and take a form of grant by means of an equitable assignment, trust or charge.[473] The judge viewed this particular clause to mean that the legal title to the goods would pass to the buyer, and consequently, the seller would only retain an equitable title, pursuant to the contracted clause.[474] The decision of *Re Bond Worth* has been supported by Goode who states that there is no scope of equity to operate in such situations where the legal and beneficial ownership are combined: 'the legal and beneficial ownership does not have a legal title combined with an equitable title. He is simply the full owner.'[475] On interpreting the true construction of the clause, although the clause referred to the equitable and beneficial ownership, the buyers granted a floating equitable charge as a means of security for the sellers for the full purchase price of the fibre and not a trust for the benefit of the sellers. As such, the case further established that a retention of equitable interest would indicate a charge, which would only have legal effect if it had been registered as a charge. Accordingly, 'any contract which, by way of security for the payment of debt, confers an interest in property defeasible or destructible upon payment of such debt…must necessarily be regarded as creating a mortgage or charge, as the case may be.'[476] It is evident that the court adopted a functional approach when reaching this conclusion.[477]

The ambiguity surrounding legal ownership and retention of title clauses can pose serious and controversial issues, such as conferring extensive rights to the buyer to the point of disregarding the seller as a legal owner. This would result in an unjust balance of rights, where the seller's rights would be disproportionately small and ultimately, would leave the seller exceedingly vulnerable. In such a situation, the retention of title clause would be of no practical benefit to the seller, as in the event of a buyer's insolvency, the disparate rights in favour of the buyer would thwart the goods returning to the seller.[478] It is clear that in relation to retention of title clauses, the buyer acquires either the legal title to the goods or acquires nothing beyond a mere contractual right. Accordingly, this reflects the universality of the contract of sale and the notion of not wanting to overcomplicate the contract by

[472] *Re Bond Worth, op cit* fn 470 as per Slade J at [246].
[473] R Goode, *Proprietary Rights and Insolvency in Sales Transactions, op cit* fn 466 at 102.
[474] G McCormack, *Reservation of Title, op cit* fn 33 at 9.
[475] R Goode, *Proprietary Rights and Insolvency in Sales Transactions, op cit* fn 466 at 102.
[476] *Re Bond Worth, op cit* fn 470 at [248].
[477] P Spink and C Ong "Substance versus form: Anglo- Australian perspectives on title financing transactions" (2004) 63(1) *Cambridge Law Journal,* 199-225, at 204.
[478] D Turing "Retention of title: how to get value from a bad penny" (1995) 16 (4) *Company Lawyer*, 119-122, at 119.

equitable ownership.[479] In addition, it also reflects that under a contract of sale, title passes by agreement, and with the exception of where title is reserved to secure payment, a seller usually intends to reserve a right to the disposal of the goods elsewhere, as per section 19 of the Sale of Goods Act.[480]

3.6 Finding the appropriate balance within the Act

3.6.1 Certainty v Flexibility

When it comes to the Sale of Goods Act, a delicate balance is needed to ensure sufficient certainty in understanding is met with the need to ensure a level of flexibility. As emphasised by Lord Brandon in the case of *Leigh & Sullivan v Alikamon Shipping Co*[481]: 'yet certainty of the law is of the upmost importance, especially by no means only, in commercial matters.'[482] Certainty of meaning within the Sale of Goods Act is considered to be of paramount importance, in order to ensure that the relevant parties are fully informed when entering a contract for the sale of goods. However, in the context of the Sale of Goods Act, certainty of meaning is in constant conflict with the apparent need for the Act to be flexible. Omitting specific definitions such as title and ownership, serves the Act a degree of flexibility in which it can arguably adjust to the changing market.[483] However, as exemplified in the arguments above, omitting these crucial definitions is leading to adverse consequences. The fundamental need for clarity and certainty in this area of law is particularly acute: 'commercial buyers and sellers need a high level of certainty so that they can plan intelligently, taking into account possible risks, profits and losses, and so achieve their goals and fulfil their expectations.'[484] The objective of striking an appropriate balance between certainty and flexibility within the Sale of Goods Act has not been realised and thus preferring a more flexible approach where definitions are not supplied, arguably creates further legal uncertainty and inconsistency in application.

3.6.2 Practical difficulties of definitions

Giving the broad nature of the notion of ownership, developing a suitable definition which encompasses the concept fully is extremely difficult. In attempting to provide a comprehensive definition which covers all aspects pertinent to ownership, arguably such a definition would be deemed too wide and would subsequently invite notable problems.

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[479] R Goode "Ownership and obligation in commercial transactions" (1987) *Law Quarterly Review,* 1-17, at 3.
[480] *ibid* at 4.
[481] *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785.
[482] *ibid* as per Lord Brandon at [817].
[483] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 10.
[484] *ibid.*

Omitting definitions within the Sale of Goods Act is a tactical manoeuvre which affords the Act sufficient flexibility. By not confining the terms such as ownership and title to a singular meaning, such terms can be used on a wider scale. Accordingly, 'for on many occasions it is no doubt possible to say that some person or other has a title and leave it all at that; and thus significant conceptual and legal disagreements are allowed to remain in the background.'[485] Leaving the concept of title and ownership vague, enables the Act to continually change its content to the exigencies of legal practice. As such, ascertaining the exact meaning of title has been branded an 'unnecessary abstraction.'[486] It can be argued that the elusive nature of the concepts deems title and ownership to be unsusceptible to a satisfactory definition in the context of the sale of goods.

Although at first glance, title and ownership are perceived to be relatively simple concepts, the reality of the situation is far from straightforward. This is supported by Hargreaves who cites:

'Simple and coherent as they are, are simple and coherent only because they are based upon strict regard for the traditional terminology of the law; or, conversely, that the confusion which exists in the text-books on the subject is due not to any confusion in the authorities but to a laxity of language…If this laxity of language can produce confusion in one branch of law, it will produce confusion in other branches…'[487]

This emphasises that laxity of language can cause terminological uncertainty. This has grave implications on wider areas of law as title and ownership transgress beyond the boundaries of the sale of goods context. Accordingly, constructing definitions that are sufficiently flexible yet restricted enough to not warrant uncertainty, seems increasingly difficult.

3.7 Unsuitability of title for modern purposes

When ascertaining whether or not title has passed with regards to retention of title clauses, notable problems occur. It is argued that the concept of title is indivisible which further complicates matters when attempting to segregate ownership between seller and buyer. In relation to sales contract, title can be construed as an elusive concept, much like ownership. Accordingly, passing title has been described by Llewellyn as 'locating a mythical or…mystical essence known as title, which is hung over the buyer's head or the seller's like a halo.'[488] This position can be contrasted with property matters such as a title to lands, in which title serves a meaningful purpose because of the concrete chain of

[485] L Rostill "Relative Title and Deemed Ownership in English Personal Property Law", *op cit* fn 388 at 33.
[486] R Hickey, *Property and the Law of Finders, op cit* fn 419 at 166.
[487] A Hargreaves "Terminology and Title in Ejectment" (1940) 56 *The Law Quarterly Review,* 376-398, at 397.
[488] K Llewellyn "Through Title to Contract and a Bit Beyond", *op cit* fn 456 at 165.

documents, which definitively state where title to a disputed land lies.[489] Therefore, it is clear that evidence of title assumes significant importance in any transaction involving land.[490] Arguably, the main question to pose is: how does one prove what title he has received and therefore, transfer the title on?[491] In practical terms, the answer to this question will depend entirely on the nature of the property transferred. This can be exemplified by transferring land, ships or company shares, where documentary title is expected to ensure the validity of the transferor's title.[492]

As such, it is argued that the certainty of proprietary interests such as retention of title clauses, is hindered by the fact that there is an absence of a system which registers such quasi-security interests.[493] The notion of transferring title in a contract of sale leads to adverse consequence of letting 'the chain of title evidence run into curious confusion with unseen, intangible intention.'[494] The difficulty arises from the fact that most cases involving retention of title clauses are transient in nature, meaning that the chain of title is so short as to not warrant sufficient and concise evidence of title.[495] Accordingly, title has been described as 'a purely juridical notion, occupying a conceptual space.'[496] The proprietary approach taken by the Sale of Goods Act, in which passing of property is treated as a mere effect of a contract rather than a conveyancing process, further adds to the overall confusion and uncertainty of this area of law. The proprietary focused approach has an adverse consequence on third parties in insolvency proceedings, most notably a buyer's creditor, as an effective retention of title clause means that a buyer can prima facie use the goods to satisfy claims of insolvency. The issue of relativity of title will not be solved imminently, and of course the easiest solution to this problem would arguably be to suggest a system of registration.[497] It would be easy to suggest that ownership should be registered, similarly to land registration which provides concrete evidence of ownership. However, this is simply not practical nor feasible.[498] The concept of registering a plethora of all ownerships is completely impractical and utterly unreasonable in the commercial sector. In addition, as we have established that the concept of ownership, title and property is so elusive, the scale of registering all concurrent interests, duties and rights is simply unfathomable. Providing suitable

[489] *ibid.*
[490] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 270.
[491] L McClure et al "The History of a Hunt for Simplicity and Coherence in the field of 'ownership', 'possession', 'property' and 'title'", *op cit* fn 443 at 110.
[492] *ibid.*
[493] For further discussion see sections 4.2 and 7.3.2
[494] K Llewellyn "Through Title to Contract and a Bit Beyond", *op cit* fn 456 at 166.
[495] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 270.
[496] R Hickey, *Property and the Law of Finders, op cit* fn 419 at 165.
[497] See section 4.2 for the main advantages of a system of registration for retention of title clauses.
[498] For further discussion on this, see sections 4.3 and 7.3.2.

definitions in the context of the Sale of Goods Act may be considered an appropriate starting point to providing the much-needed solution to the above issues.[499]

Another fundamental problem relating to retention of title clauses, is that it is clear that the current law cannot govern nor adequately manage the modern commercial environment, where these types of clauses are particularly prolific. It is implied that the law of retention of title clauses is plagued by uncertainty because of a fundamental conflict in basic principles. It is put forward that 'title' as a concept is static in nature, which can be contrasted with the highly dynamic environment of transactions of sales.[500] It is thus suggested that the premise of establishing title is an arbitrary process, which is dependent on the contiguity of time.[501] Retention of title clauses and the concept of transferring ownership only ensures certainty in relatively simple cases in which title and ownership are passed seemingly in one transaction, as exemplified by cash purchases. Simple retention of title clauses of this particular nature, do not often encounter legal or practical difficulties as such an action seemingly fits the legal framework, which reflects the established expectations of the buyer and seller relationship.[502] This is supported by Llewellyn who writes that transferring ownership: 'fits only in that rare case in which our economy resembles that of three hundred years ago: where the whole transaction can be accomplished in one stroke, shifting possession along with title, no strings left behind.'[503] This can be directly contrasted with a typical modern contract of sale, which is encumbered by sales on credit and further complicated by lengthy extended periods of time in which matters are suspended temporarily, whereby title is not held by either party. It is evident that modern day transactions involve a complicated series of events, it is rarely one simple transaction from start to finish. Furthermore, 'the title-concept is not adapted by courts to the real field of Sales disputes; it is also to blunt to fit particular issues as they arise…the cut of its many facets is an old-fashioned one which fits a few of the modern situations for which it is called upon as a touchstone.'[504] Additionally, this matter is complicated further as under retention of title clauses, parties are able to use goods to continue their business activities, without possessing title to the goods, thus meaning that a party can have full usage of the goods without ownership. As such the modern day contract of sale between buyers and sellers is not a straightforward transaction, rather the transaction proceeds at a fast moving pace which involves a series of multiple dealings. For such reasons, title as a static concept does not appropriately fit such modern circumstances.

[499] As will be discussed in section 7.2.
[500] K Llewellyn "Through Title to Contract and a Bit Beyond", *op cit* fn 456 at 167.
[501] I Davies, "Transferability and Sale of Goods", *op cit* fn 401 at 2.
[502] E McKendrick et al, *Sale of Goods, op cit* fn 404 at 1.
[503] K Llewellyn "Through Title to Contract and a Bit Beyond", *op cit* fn 456 at 167.
[504] *ibid* at 169.

3.8 Conclusion

As evidenced from the above arguments, terminological uncertainty is apparent in this area of law, specifically in the context of the Sale of Goods Act. Much of the confusion is caused by the linguistic choice of words employed by the Act and the subsequent lack of definitions. As epitomised by Lin: 'the Sale of Goods Act uses the terminologies of property, owner and title, and remarkably there still is a diversity of views about what they mean.'[505] In the one instance, where the Act does provide a definition of property by virtue of section 61, this does little to overcome the terminological uncertainty as the definition is deemed to be inadequate. The plethora of views on the meaning of property, owner and title has hindered the application of such terms in practice.

Within the context of the Sale of Goods Act, the problem is heightened further as one cannot rely on the common law to facilitate understanding of the three concepts: title, ownership and property. As established earlier, the common law seeks to protect possession, with the implication of title equating to a right to possession.[506] The common law has no concept of a title to ownership nor does it perceive ownership as an interest of personal property, which means it has little significance in facilitating the meaning of property, title or ownership in the context of sales of goods. Under the remit of the sale of goods, ownership and possession are segregated in order to reflect the commercial market, specifically the separation accommodates the provision of unsecured credit.[507] In a commercial context, if the passing of ownership entailed the same as the passing of title, then a seller must have title or face the implications of breaching contract. Accordingly, 'separating title and ownership makes commercial sense if a buyer is responding to risks of loss and deterioration, where they are exacerbated by the need for long distance or delayed carriage or some other reasons.'[508] It would appear that few academics would dissent from the notion that although the terms title, property and ownership are ubiquitous, neither term is as straightforward as it seems.

The underlying point is that the lack of definitions provided by the Sale of Goods Act obscures the clarity of the basic conceptual meaning of title and ownership. Arguably, expressing ideas pertinent to these terms are met with great difficulty and the interrelation between the concept of title, ownership and property serves to fuel further confusion.[509] The various ways in which these specific terms are connected in close proximity makes it extremely difficult to obtain a coherent approach.

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[505] T Lin "Does ownership matter in the sale of goods?" (2011) *Journal of Business Law,* 1-11, at 1.
[506] *ibid.*
[507] *ibid* at 6.
[508] *ibid.*
[509] R Hickey, *Property and the Law of Finders, op cit* fn 419 at 167.

The same reasoning can be applied to the almost impossible task of forming consistent terminology which reflects the meaning of these terms in the context of sale of goods. Although it has been suggested that definitions within the legislation would provide some much-needed clarity, there are inherent difficulties for constructing such definitions to achieve the desired effect. It is evident that this area of law is struggling to bring analytical clarity and certainty to the fundamental concepts of title and ownership, which has subsequent detrimental implications for the application of law to retention of title clauses. How can retention of title clauses achieve their functional objectives, if the basic understanding of title, ownership and property are at legal crossroads? The uncertainty and nuances in application around these concepts subsequently leads to an accumulation of cases and disputes reaching the courts for judicial clarification as illustrated by cases such as *Clough Mill* and *Re Bond Worth*. Evidently, one of the main implications of this issues is that retention of title clauses are hindered by the incoherent and piecemeal approach adopted by the courts to tackle issues brought on by the lack of legislative definitions or guidance. What has emerged during the course of this discussion is that from the onset, retention of title clauses are stifled by terminological and definitional uncertainty.

The following chapter continues to identify areas of inconsistency and evidences the difficulties of adopting a piecemeal approach to retention of title cases in the context of company charge registration. The discussion will also reinforce the implications of not having overarching principles providing clarification to this area of law. Under the present regime, legal uncertainty will continue to beset this area of law until clarification is provided by the courts, which either resolves the issue at hand or contributes to the minefield of issues currently associated with retention of title clauses. The next chapter will also illustrate the general reluctance of the courts to uphold certain types of retention of title clauses, which further adds to the argument that retention of title clauses are being hindered from achieving their functional objectives by significant legal uncertainty.

CHAPTER 4: REGISTRABLE CHARGES AND RETENTION OF TITLE CLAUSES

4. Introduction

One of the main difficulties in respect of retention of title clauses is whether such clauses constitute a registrable charge. The utility of a retention of title clause as a means of offering a form of protection to the seller, will be jeopardised and thwarted if the clause is inferred as asserting continuing property rights in the goods and thus, constitutes creating a charge. It will no longer be possible for a seller to maintain title to the goods if the clause is inferred as creating a registrable charge. Despite the conceptual availability of different types of retention of title clauses, in practice the courts are less likely to enforce such clauses and instead will interpret such clauses as creating a registrable charge. There have been many instances whereby retention of title clauses have been construed as constituting a charge which are subsequently held void for lack of registration as per s859A of the Companies Act 2006 as evidenced below.[510] As such, there are ever-increasing situations where retention of title clause will not be effective and fail to provide the expected level of protection on account of being construed as constituting a registrable charge. Retention of title claimants must attempt to thread a path through the ever-complicated minefield of situations where retention of title clauses will be held ineffective. The interaction between retention of title clauses and the provisions relating to company charge registration is thus crucial in determining whether the retention of title clause will be held to be effective as merely preventing title from passing to the buyer rather than asserting more extensive rights in the goods. The depiction of this area of law as a minefield is particular apt in the context of company charges as being held void for lack of registration is synonymous to the mine exploding and thus bringing an end to the utility of the retention of title clause in the present commercial situation. The protection offered by a retention of title clause will fall short once it has been construed as constituting a charge on the goods as it will more than likely be held void for non-registration. Clearly, once a clause has been inferred to create a charge, this poses significant practical problems for the seller who will no longer be able to retain title to the goods supplied nor rely on the retention of title during the insolvency process. Evidently, this causes significant uncertainty for retention of title clauses as a functional mechanism as their objectives are considerably impeded once the provision has been construed as creating a charge.

[510] Section 859A of the Companies Act 2006.

The principal focus of this section is to explore the interaction between retention of title clauses and registrable charges. Retention of title clauses are not identified as registrable charges per se, however certain types of retention of title clauses such as prolonged clauses can constitute a charge in specific situations as will be evidenced further below. Generally, retention of title clauses are not security interests and accordingly, they do not require registration on the basis that the are not asserting the seller with continuing property rights in the goods supplied. Contrastingly, a security interest usually demanded by banks or other commercial lenders would most certainly require registration. Accordingly, retention of title clauses are merely a contractual agreement of sale which prevents the transfer of title until the purchase price of the goods has been met. As such, it is important to identify whether the clause involved is a genuine and valid retention of title or whether what has been drafted in the contract purports to involve the creation of a new security interest, most notably a charge which will require registering in order to evade being held void.

Whether a clause constitutes a registrable charge will depend on the precise wording of the contract involved and the commercial situation of the dispute.[511] Whether a contractual agreement creates a security interest such as a registrable charge, will usually be apparent from taking a cursory reading of the agreements terms.[512] But there are some types of agreements where it is not easy to characterise the interest in the strictest sense, as it may appear to fulfil a security function but nevertheless, is not a security agreement. As such, it is evident that a fine distinction exists between a provision which effectively retains title and clauses being struck out by the courts on the basis that the interest infers a registrable charge. Accordingly, 'with other types of retention of title clauses the application of the company charge registration regime is somewhat less certain.'[513] Therefore, complications arise in determining whether in certain circumstances a retention of title clause can constitute as a registrable charge. It can be argued that controversy has centred on the applicability of registrable charges in the context of retention of title clauses.[514] In certain instances, different types of retention of title clauses constitute a registrable charge, thus, the close affiliation with registrable charges often causes legal uncertainty in courts.[515] Thus, the purpose of this section is to identify that once again, retention of title clauses as a legal mechanism are hindered by legal uncertainty brought about by the courts. The aim of this chapter is to explore the interplay between retention of title clauses and company charges and as such the former part of this section will explore the regime and purpose behind charges and

[511] *Clough Mill Ltd v Martin, op cit* fn 45 as per Robert Goff LJ.
[512] R Goode and E Kendrick (ed), *Goode on Commercial Law,* 5th Ed, London: Penguin Books, 2016, at 22.26.
[513] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 166.
[514] G McCormack "All-liabilities reservation of title clauses and company charges" (1989) *Conveyancer and Property Lawyer,* 1-5, at 1.
[515] G McCormack, *Registration of Company Charges,* London: Sweet & Maxwell, 1994, at 67.

company charge registration and the latter half will focus on situations involving retention of title clauses exclusively. At present, an effective retention of title clause does not require any form of registration, however a detailed exploration of the rationale behind registration is necessitated as such factors will bear significance when providing suggestions on reform for this area of law as laid out in a subsequent chapter.[516]

4.1 Definition of a charge

A charge constitutes an equitable proprietary security interest and is formed when parties agree that certain property will be appropriated in order to discharge a particular debt or obligation.[517] The agreement is contracted without a transfer of title. The proprietary interest enables the charged property to be appropriated and sold, subsequently using the proceeds of sale to finance the repayment of outstanding debts or obligation.[518] Therefore, a charge is a form of security against which a company is able to acquire finance from potential lenders. In the event of an insolvency, the holder of the secured property will have an advantageous position in the insolvency proceedings and as such a secured creditor is more likely to be fully repaid in comparison with the position of unsecured creditors. Accordingly, a seller is not subjected to an unsecured claim in the insolvency proceedings. A charge is particularly advantageous for business lenders as it can minimise risks of non-payment, facilitates the access of credit and allows the use of the charged goods. For such reasons, a creditor holding a fixed or floating charge as security, allows the holder to have a certain degree of influence or control over events.[519] The priority afforded to the charger will act as a deterrent to unsecured creditors from precipitating enforcement actions which may directly affect the company's assets in insolvency.[520] Additionally, in the event of an insolvency, a holder of a fixed and floating charge can exercise a degree of influence and control by appointing an out of court administrator. Ensuring that a holder of a charge can exercise considerable influence during the insolvency proceedings, remains one of the key attributes for using such a charge.[521] There are two types of charges: fixed or floating charges. A fixed charge is attached to a particular asset in which a debtor has limited ability to dispose of its assets. Whereas a floating charge is a much more flexible method which allows a debtor to dispose of its assets in the ordinary course of its business. A fixed charge takes priority over the floating charge in the event of a company's insolvency. Thus, the priority of the floating charge is

[516] See Chapter 7 for a discussion on suggested reform measures.
[517] P Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law,* 10th Ed, London: Sweet & Maxwell, 2016, at 1130.
[518] *ibid.*
[519] L Gullifer (eds), *Goode on Legal Problems of Credit and Security,* 5th Edition, London: Sweet & Maxwell, 2014, at 1.
[520] *ibid.*
[521] *ibid* at 2.

subordinated. The distinction between the two types of charges was historically laid out by Lord Macnaghten in the case of *Illingworth v Houldsworth*[522]*:*

'A specific [fixed] charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject matter of the charge within its reach and grasp.'[523]

A floating charge can extend to both present and future goods and allows the charge holder to dispose the title of the subject matter of the charge until the 'crystallising event'. The crystallising event allows a charge holder to intervene upon the occurrence of an event such as failure to pay or if a company enters liquidation and subsequently the floating charge will transfer to a fixed charge over the goods.[524]

It will not have escaped the notice of the perceptive reader that many of the above factors are synonymous to the benefits associated with incorporating a retention of title clause within a contractual agreement. The similarities between the two commercial mechanisms may provide one explanation as to why there is such an interconnection between retention of title clauses and company charges. It comes as no surprise that the close affiliation between retention of title clauses and registrable charges causes significant uncertainty for the courts. Clearly, both mechanisms share similar rationales for usage and thus, at times it is difficult to ascertain the delicate distinction between the contractual provision merely preventing the transfer of title and a charge which is asserting continued property rights in the goods. Despite the similarities in usage there are inherent differences between retention of title clauses and company charges, most notably the omission of transfer of property and the requirement of registration.

The first notable difference between a retention of title clause and a company charge is that charges lack the element of transferring property instead under a charge, security is asserted for payment of debt. For an explanation of the nature of a charge, we can turn to Atkin LJ in the case of *National Provincial and Union Bank of England v Charnley*[525] in which he states:

'It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future,

[522] *Illingworth v Houldsworth* [1904] AC 355.
[523] *ibid* as per Lord Macnaghten at [358].
[524] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 47.
[525] *National Provincial and Union Bank of England v Charnley* [1924] K. B. 431.

shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge…'[526]

In order to distinguish a registrable charge from a retention of title clause, it is important to note that a charge is not dependent on the delivery of possession nor the transfer of ownership. Rather a charge merely represents an agreement[527] between a creditor and a debtor which stipulates that a particular asset is used for the satisfaction of a debt, whereby a creditor can discharge the indebtedness before unsecured creditors can claim the assets in insolvency.[528] A holder of a charge is entitled to a higher position of priority than unsecured creditors in the process of insolvency. Therefore, charges can be distinguished from retention of title clauses as charges do not involve the transfer of property to the creditor. A charge is described as simply an encumbrance over property, which is subsequently lifted when the advance is repaid.[529] Accordingly, 'the charge does not transfer ownership to the creditor; it is merely an encumbrance, a weight hanging on the asset which travels into the hands of third parties.'[530] Contrastingly, retention of title clauses are held to be no more than a stipulation as to when property is to pass from seller to buyer, despite the fact that the device fulfils the same security function.[531]

The most notable distinction between a retention of title clause and a company charge is the requirement of registration. Part 25 of the Companies Act 2006 contains provisions in respect of registering charges, with s859A stipulating that any charge must be registered[532], subject to exceptions.[533] As such the main difference between a retention of title clause and a charge is that charges require registration, which provides a degree of transparency to lenders, commercial actors and unsecured creditors as the registration system is open to the public, whereas retention of title clauses are not security interests and hence do not require any form of registration. A system which registers charges is considered necessary in order for the financial system to operate efficiently and allows business to access credit in order to develop and grow the businesses. Failing to register a charge has the consequence of rendering it void against the creditor as governed by section 859H of the Companies Act 2006. It is the responsibility of the company to send the appropriate documents

[526] *National Provincial and Union Bank of England v Charnley*, *op cit* fn 525 as per Atkin LJ at [449].
[527] See further, *Lehman Brothers International (Europe) (in administration)* [2012] EWCA 2997 at [43]*, Re TXU Europe Group Plc* [2003] EWHC 3105 at [35].
[528] L Gullifer (eds), *Goode on Legal Problems of Credit and Security, op cit* fn 519 at 36.
[529] H Beale et al, *The law of security and title based financing,* 2nd Ed, Oxford: Oxford University Press, 2012, at 10.
[530] L Gullifer (eds), *Goode on Legal Problems of Credit and Security, op cit* fn 519 at 36.
[531] R Goode and E Kendrick (ed), *Goode on Commercial Law, op cit* fn 512 at 22.05.
[532] P Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law, op cit* fn 517 at 1138.
[533] See section 859A(1) and (6) of the Companies Act 2006.

for registration. As stipulated by Davies, 'there is thus a very powerful practical sanction for non-registration.'[534] Registration is considered to be of paramount importance as failure to register a security interest will result in the security interest being held void. Failing to register has detrimental implications such as not being able to rely on the security interest during the insolvency process of a company. Charges that ought to be registered but failed to do so, are held to be void as against the liquidator, administrator and any creditor.[535] As noted by Gough, 'every relevant charge created by a company is, so far as any security on the company's property or undertaking is conferred by the charge, void against the liquidator or administrator or any other creditor of the company unless registered with the registrar of companies within 21 days of creation.'[536] Following the amendments to the Companies Act 2006, failure to register is no longer considered a criminal offence, however the security interest will be held void. By not registering a charge, the consequences will result in the holder of the charge being disadvantaged rather than the company, as that holder will essentially lose their position of security in the event of the company's insolvency. As such the main implication of non-registration, is thus that the holder of the charge will ultimately lose their priority in an insolvency.[537] Another implication of failing to register is found in s859A of the Companies Act which states that the underling debt will be accelerated as a direct result of failing to register.[538] When a charge is void for failure to register the money secured, the charge becomes immediately payable. As such there is an economic incentive to register a charge correctly. Failure to register could lead to serious negative consequences in the event of insolvency such as causing cross-defaults in other debts.[539]

4.2 Rationales for registration

Having outlined the nature of charges and the fundamental differences between company charges and retention of title clauses, the focus of this discussion will now turn to explaining the rationale of registration. The following section outlines notable advantages and issues pertinent to the requirement of registration. The principle of retention of title clauses not requiring registration has already been emphasised throughout the course of the chapter, and as such it may appear peculiar

[534] P Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law, op cit* fn 517 at 1138.
[535] *ibid* at 1137.
[536] W Gough, *Company Charges,* 2nd Ed, London: Butterworths, 1996, at 447.
[537] G McCormack, *Reservation of Title, op cit* fn 33 at 99.
[538] A Gregson and J Bell "Registration of UK company charges- theory and practice" (2017) 32(9) *Journal of International Banking and Financial Law,* 1-5, at 2.
[539] *ibid.*

that the subsequent section will focus on registration in depth. However, this discussion is intentional and will serve a greater purpose for the final chapter of the thesis, where suggestions on how to address the legal minefield of retention of title clauses will be put forward. The following will be taken into consideration when seeking to suggest solutions to address the current issues which impact considerably on the functionality of retention of title clauses. As retention of title clauses and company charges are so closely affiliated with regards to general usage, it is worth examining the viability of the registration system imposed on company charges.

4.2.1 Transparency

One of the most evident purposes for requiring the registration of a charge, is that it is a method of providing relevant information to potential lenders.[540] Transparency can be grouped into three separate categories: transparency for lenders and commercial actors, transparency for unsecured creditors and a more general transparency in the market itself. Registration of a charge can reveal the financial status of a particular company and as such can provide potential lenders accurate and up to date information regarding the company's secured lending practices. Displaying a company's financial information also has the benefit of informing other important involved parties such as creditors, insolvency practitioners, shareholders and investors.[541] To this extent, it is possible for involved parties to ascertain the creditworthiness of a company through searching for the registration of charges. This is important as the creditworthiness of a company may directly impact on those about to deal with or become creditors of the company, as the existence of a company charge can alter the distribution of priority.[542] To this degree, displaying the existence of the company's charges or mortgages would be most beneficial to credit reference agencies, financial analysts or prospective investors.[543] This is considered to be particular advantageous for the company itself, as it can provide assurance to involved parties that the assets offered as security are unencumbered.[544] Therefore, the objective of registration is to supply information pertinent to the creditworthiness of a company, by searching the monetary value of indebtedness and whether or not certain property of the company has been encumbered or charged.[545]

[540] P Davies and S Worthington, *Gower & Davies: Principles of Modern Company Law, op cit* fn 497 at 1137.
[541] *ibid.*
[542] W Gough, *Company Charges, op cit* fn 536 at 448.
[543] G McCormack, *Reservation of Title, op cit* fn 33 at 197.
[544] See generally, A L Diamond, *A Review of Security Interests in Property,* (also known as the Diamond Report), HMSO, 14 at para 11.1.5.
[545] W Gough, *Company Charges, op cit* fn 536 at 448.

The rationale behind the concept of registration, whereby registration provided relevant information to parties was emphasised in the case of *Re Jackson and Bassford Ltd.*[546] Buckley J stated that the objective of registration is: 'that those who are minded to deal with limited companies shall be able by searching a certain register, to find whether the company has encumbered its property or not.'[547] Lord Parker in *Dublin City Distillery Ltd v Doherty* suggested a step further by implying that a register would give notice to all those involved in the company of important matters which affect the credit of a company.[548] Any involved party can assess the creditworthiness of the company by examining the register of charges in order to ascertain whether or not any assets of the company are liable to be used to satisfy debts in claims in priority.[549] As such, the courts have long recognised that the purpose of registration is to provide the necessary information about prior charges granted by the company over certain assets. Thus, registration ensures that any charges or mortgages over companies are openly publicised. In this manner, in the winding up process, creditors are aware whether assets of the company are held by charge or mortgaged. Therefore, one of the rationales for registration is that it publicly creates awareness of the existence of a charge and supports transparency.

A transparent system of registration is vitally important to ensure an efficient insolvency market. The registration system's transparency and efficiency has a direct impact on companies and businesses in general. The charges register is efficient in a way that is saves time and money for companies as the registration system facilitates the access of information. The World Bank Report of 2011 highlighted the important implications of a transparent system facilitating access to information as it can help alleviate financial constraints.[550] Ensuring transparency would also increase the confidence amongst lenders. It is evident that the transparency of the register can be exemplified by the fact that registrations can be effected online. This simplifies the overall process of finding a registered charge and for registering a charge as well.[551]

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[546] *Re Jackson and Bassford Ltd* (1906) 2 Ch. 467.
[547] *ibid* as per Buckley J at [476].
[548] *Dublin City Distillery Ltd v Doherty* (1914) AC 823 as per Lord Parker at [854].
[549] W Gough, *Company Charges, op cit* fn 536 at 449.
[550] The Report of the World Bank and the International Finance Corporation, *Doing Business 2012: Doing Business in a more transparent World,* 2011, 21 available at https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB12-FullReport.pdf Accessed 04/02/18.
[551] R Calnan, *Taking Security,* 3rd Ed, Bristol: Jordan Publishing Limited, 2013, at 186.

4.2.2 Protecting the vulnerable

The registration of charges is also intended to protect any unsecured creditors of the company.[552] A typical example of when an unsecured creditor is in need of protection is illustrated by Gough, 'a company might obtain credit on the strength of property in its possession and other assets, which prospective creditors might consider to be available to satisfy their debts in the belief that such property or assets were unencumbered.'[553] The need to require registration to protect unsecured creditors can be illustrated by the case of *Re Yolland*[554], in which companies were allowed to issue debentures and subsequently create a charge over all their present and future assets, with no means of ascertaining whether such debentures were in fact issued. Accordingly, the court held that: 'for the protection of the general creditors of the company, or of the persons desiring trade with the company, it was thought fit to require that there should be a register.'[555] Company registration can thus benefit a wide group of involved parties but most notably unsecured creditors.

The charges registration is advantageous to unsecured creditors as the register renders an unregistered charge void against the liquidator or any other creditor. As such, it can be argued that unsecured creditors directly benefit in circumstances where a charge is held void for lack of registration because the register essentially removes the priority of the security interest.[556] In the majority of cases, it is the corporate debtor who take security over personal property, as such the vulnerable refers to any party who will be directly impacted by the taking of security, most notably unsecured creditors.[557] Furthermore, it is evident that registration of charges offers unsecured creditors or third parties a degree of protection, from charges that would otherwise remain completely unknown to them.[558]

4.2.3 Combatting fraud

It is widely received that registration of company charges is considered fundamental as a method of combatting fraud. One of the most fundamental dangers of apparent ownership is that creditors can be misled in circumstances where a debtor has possession of property, but said property is subjected to a security in favour of a third party.[559] Thus, registration can facilitate the role of a receiver or

[552] W Gough, *Company Charges, op cit* fn 536 at 447.
[553] *ibid* at 453.
[554] *Re Yolland, Husson and Birkett Ltd* (1908) 1 Ch. 152.
[555] *ibid* as per Cozens-Hardy MR at [156].
[556] W Gough, *Company Charges, op cit* fn 536 at 457.
[557] H Beale et al, *The law of security and title based financing,* 2nd Ed, *op cit* fn 529 at 4.
[558] *ibid* at 388.
[559] *ibid.*

liquidator in trying to ascertain the validity of an apparent charge or mortgage. In this way, registration can identify the alleged validity of a charge or mortgage and can subsequently, reduce the risk of fraud. Registration of charges would also make it more difficult for companies to conceal the use of secured credit. As highlighted by Gough, without the registration of charges or mortgages, 'there could be a false appearance of creditworthiness caused by undisclosed security over property in the continued use and possession of the debtor.'[560] In addition, registration is a useful mechanism for safeguarding against fraud, particularly in the event where it is claimed that the security interest has come into effect far earlier than the real case.[561]

Registration of company charges reduces the known problem of a company proprietor taking advantage of their company assets by conferring a charge on the assets, and thus ensuring a higher claim in priority, to the detriment of general creditors who would be aware of the existence of the charge.[562] This problem was manifest in the case of *Salomon v Salomon*[563]; where a company proprietor had secured a debenture with a floating charge to secure his capital investment. This situation was particularly alarming as the floating charge covered the entirety of the company's undertaking whilst the company was also able to continue trading in the ordinary course of business, just as if the security did not exist.[564] Such a stipulation meant that the floating charge ensured that Salomon ranked higher in priority than all of the other unsecured creditors.

Another way in which the registration system combats fraud is by reducing defective registration. Under the relevant legislation, the company or charge holder is responsible for the completeness and accuracy of the registration of a charge.[565] Where the particulars of a charge are not accurately registered, the charge will be held void as the company or charge holder have subsequently failed to disclose the charge accurately for the purpose of registration.[566] The consequences of failing to deliver charges to the registrar are contained in section 859H of Part 25 Company's charges of the Companies Act 2006.[567] As such, the onus is on the company and charge holder for the accuracy of the registration of the charge and the reason of not wanting the charge to be held void provides an appropriate motivation for conformity.

[560] W Gough, *Company Charges, op cit* fn 536 at 454.
[561] H Beale et al, *The law of security and title based financing*, *op cit* fn 529 at 388.
[562] W Gough, *Company Charges, op cit* fn 536 at 454.
[563] *Salomon v Salomon & Co Ltd* (1897) AC 22.
[564] W Gough, *Company Charges, op cit* fn 536 at 454.
[565] C Mayo and E Ferran, "Registration of company charges the new regime" (1991) *Journal of Business Law,* 152-169, at 163.
[566] *ibid* at 157.
[567] See further, Part 25 of the Companies Act 2006.

4.2.4 A way of determining priorities?

Registration of charges is deemed useful for determining priority amongst secured creditors. If a company is wound up, charges take priority based on the date of creation, whereby those charges created first have priority. Therefore, registration is considered to be important as a method of determining priority based simply on the date of the registration of the charges. This is also supported by Graham who suggests that one of the principal aims of the system of registration is the determination of the priorities of security in which a company creates over its property.[568] The system of registration for charges and mortgages appears to be consistent with the general rule that earlier claims of charges should prevail over later claims, thus ensuring a degree of fairness amongst charge holders.[569] Registration is therefore considered to be of vital importance to ensure that secured creditors by way of a charge, rank ahead of other creditors.[570]

However, registration of charges does not determine priority amongst competing security interests, which are subjected to the usual *pari passu* allocation (as discussed in the previous chapter). Accordingly, 'registration is not a reference point for determining priorities.'[571] The priority of competing security interests such as charges is governed by a combination of provisions of the Insolvency Act 1986 and common law rules.[572]

4.3 Notable problems relating to registration

4.3.1 The 21 day invisibility period

A charge could be created 21 days before the charge would be delivered to the Registrar. During this period, the register does not reveal the existence of charge, and therefore to any person searching the register the charge would be invisible. Therefore, during the dates between the creation of the charge and the date in which the particulars of charge appear on the register, there would be no sign of the charge on the register.[573] One of the issues arising from the 21 day invisibility period, is that 'a lender taking a charge from a company could find that its charge ranked behind a charge which was created before but registered after the creation of the second charge but within the 21 day period

[568] P Graham "Registration of company charges" (2014) *Journal of Business Law,* 1-16, at 2.
[569] T Jackson and A Kronman "Secured Financing and Priorities among Creditors", *op cit fn* 252, at 1179.
[570] A Gregson and J Bell "Registration of UK company charges- theory and practice", *op cit* fn 538 at 2.
[571] G McCormack, *Reservation of Title, op cit* fn 33 at 97.
[572] A Gregson and J Bell "Registration of UK company charges- theory and practice", *op cit* fn 538 at 2.
[573] P Graham "Registration of company charges", *op cit* fn 568 at 3.

allowed for registration.'[574] Accordingly, this could lead to a lender being misled during this 21 day period to the existence of charge, as the register would not visibly display the charge until after the 21 day period. Additionally, one of the main criticisms arising from the registration system and its 21 day period, is that the register can subsequently be at least 21 days out of date.[575]

4.3.2 Information tension

A difficult balance lies in ensuring that the register of charges provides the appropriate amount of information to public inspection. On one hand, it is argued that the present system does not provide sufficient information regarding registrable interests. On the other hand, it is argued that the particulars of charges can disclose commercially sensitive information, which is subject to public scrutiny. Thus, the following paragraph will consider both of these juxtapositions separately and consider their respected problems.

One of the most notable problems relating to the registration of charges is that the register fails to provide a comprehensive account of the existence of a charge. As emphasised by Finch, 'the requirement that such charges be registered does little to assuage the feelings of grievance generated by such charges since the register gives very inadequate information to the trade creditor.'[576] Accordingly, it can be argued that the list of registrable charges does not provide adequate information to those searching the registration system.[577] One of the most fundamental purposes of the register of charges was to publicly disclose the existence of charges created by companies as comprehensively as possible in order for relevant parties to ascertain whether a particular asset has been encumbered or not. However, this has been criticised by De Lacy for being superficial and not reflecting the true realities of the register.[578] With regards to the application of the register, its remit has been deemed selective. The particulars of charges include information pertinent to the date of creation, the persons entitled to the charge, the amount secured by the charge and short particulars of the charge.[579] However, in practice, it is very difficult to ascertain how much a floating charge secures. As such, the registration requirement does very little to aid creditors in acquiring the necessary information pertaining to security, since the register gives inadequate information to

[574] *ibid.*
[575] C Mayo and E Ferran, "Registration of company charges the new regime", *op cit* fn 565 at 163.
[576] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 634.
[577] P Graham "Registration of company charges", *op cit* fn 568 at 3.
[578] J De Lacy "Constructive notice and company charge registration" (2001) *Conveyancer and Property Lawyer,* 122-140, at 122.
[579] G McCormack, *Registration of Company Charges, op cit* fn 515 at 73.

creditors.[580] For example, the amount outstanding on a floating charge securing bank overdrafts, would fluctuate daily and thus would be impossible to accurately state how much the floating charge is securing.[581] In addition, a company's balance sheet would not assist creditors in gathering the required information as usually the balance sheets are either months out of date or unlikely to disclose contingent secured by the floating charges.[582]

Furthermore, the charge register does not take into account any background knowledge which may be able to inform parties inspecting the register. Due to the fact that the register is open to public inspection, it is argued that the information provided should be construed with all relevant background information to ensure that the register is providing a conclusive record of any registrable interests. Arguably, this should include any admissible background information that the parties should have reasonably known. This should not include any information which would prejudicially affect parties, for example background information should not include a company's articles of association. This problem was manifest in the case of *Cherry Tree Investments Ltd v Landmain Ltd.*[583]A lender was unable to rely on a facility agreement clause which purported to extend a statutory power of sale, which was not included in the charge. One of the prominent issues of the case was that the charge was registered at the Land Registry and thus, open to public disclosure. The parties mistakenly omitted the clause which extended the power of sale, and the Court of Appeal refused to amend the legal charge, registered on the Land Registry. The Court of Appeal held that the Land Registry should contain all conclusive information, which a third party could expect to rely upon in contemplating dealing with the property. In this case, rather than relying on interpretation the claimant should have sought a rectification of the charge. As such, the lender was unable to include background information via the facility agreement to help inform a person inspecting the register.

The question of whether the charge register should include background information in order to provide a much more conclusive report remains contentious. Lord Hoffmann in his judgement in *Chartbrook Ltd v Persimmon Homes Ltd*[584] addressed both sides of the argument for and against the use of extrinsic material to interpret a charge. In certain circumstances he argued that it can be unfair for third parties to rely and refer to extrinsic background information to aid in the interpretation of a charge. However, the extent of the unfairness is heavily context dependent. Lord Hoffmann held:

[580] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 634.
[581] *ibid.*
[582] *ibid* at 635.
[583] *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736.
[584] *Chartbrook Ltd v Persimmon Homes Ltd* [1992] BCLC 693 at [40].

> 'The law has sometimes to compromise between protecting the interests of the contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say.'[585]

Arguably, increasing the awareness of a third party can be perceived as a positive implication as it would increase party autonomy. Anyone inspecting the register would be more informed as the register would arguably hold a much more conclusive record of information pertinent to registrable interests.

To ensure a comprehensive and detailed account of the registration process, the opposite problem of the register disclosing commercially sensitive information will now be discussed. The system of registration is electronic and thus all the relevant charge documents are posted online. The possibility of redaction is severely limited with redaction only available in situations involving personal data, account identifiers and signatures.[586] Thus, redacting sensitive information from the register is considered limited and difficult. Therefore, this increases the risk of documents purporting to include charges and similar features, openly accessible to the public. As exemplified by Gregson: 'even if sensitive commercial information is instead set out in documents, not filed, parties are exposed to inspection risk if such related transaction documents contain provisions which would enable a third party to identify the subject matter of the charge (s859P).'[587] Accordingly, if the particulars of the charge are not included within the instrument that created the charge, but in fact are contained in a different document, a company must comply with the legislation in keeping said document available for inspection.[588] Thus, there is a high risk of exposing sensitive information. It can be argued that the availability of information relating to company assets on the register poses a high risk of revealing sensitive information pertinent to the company, rather than simply indicating whether an asset is encumbered or not. This is a common problem as the security documents may contain confidential information, which will be most likely found in the underlying facility documentation.[589]

It is evident from the above arguments that any system of registration will always suffer a tension pertinent to information. On one hand, the register of charges will be deemed problematic for not providing sufficient information to render the register useful. Whereas, the other argument is that the

[585] *ibid*, as per Lord Hoffmann at [40].
[586] A Gregson and J Bell "Registration of UK company charges- theory and practice", *op cit* fn 538 at 4.
[587] *ibid.*
[588] See s859P of the Companies Act 2006.
[589] R Calnan, *Taking Security, op cit* fn 551 at 185.

current particular of charges discloses too much commercially sensitive material. There is no simple solution to this tension and in practical terms this equates to situations in which sensitive information will be released to anyone inspecting the register and other situations where the register will not provide adequate information to the existence of a charge. To this end, it is exceedingly difficult to meet the expectations of ensuring a conclusive and comprehensive system of registration for public inspection and not disclosing sensitive company material. A balancing act in which the holders of a charges are happy with the content of the register and that third parties inspecting the public register, will unlikely be resolved.

4.4 Boundaries with retention of title clauses

As aforementioned, it is difficult to ascertain whether or not a retention of title clause will constitute a registrable charge as it will depend on a range of variables such as the particular wording of the agreement and the commercial context in which the dispute arises. In certain instances, there is a thin dividing line in which retention of title clauses have been held to be in substance a charge and not in fact a proprietary interest of the seller. Furthermore, in situations where a retention of title clause has been inferred as a charge, then it is more than likely that the clause will be held void for lack of registration. The main implications of the clause being held void include the holder of a retention of title clause, losing their position of priority in the insolvency process and clearly, the clause will fall short of the protection it is expected to offer as will be evidenced by reference to different authorities.

An example of a retention of title clause constituting a charge is illustrated by the case of *Re Bond Worth Ltd*[590]*.* In this case, Monsanto had supplied a type of artificial fibre to Bond Worth for use in the manufacturing of carpets. The contract of sale provided to reserve in full the equitable and beneficial ownership of the goods, until the price had been paid, or until a resale, in which case the beneficial ownership extended to cover the goods supplied, any converted products which used the goods in question and any subsequent proceeds of sale.[591] The wording of the contract of sale was as follows:

'Equitable and beneficial ownership shall remain with us until full payment has been received…or until prior resale, in which case our beneficial entitlement shall attach to the proceeds of resale or to the claim for such proceeds. Should the goods become constituents of or be converted into other products while subject to our equitable and beneficial ownership we shall have the

[590] *Re Bond Worth Ltd, op cit* fn 470.
[591] W Gough, *Company Charges, op cit* fn 536 at 491.

equitable and beneficial ownership in such other products as if they were simply and solely the goods.'[592]

Accordingly, Monsanto sought to claim that under the remit of its retention of title clause, it would remain the beneficial owner of all the residual fibre which had not been sold by Bond Worth and where the fibre had been converted into carpets. Monsanto also claimed that they had a proprietary claim over the resulting money and debts.[593]

It was held by Slade J that the provisions of the retention of title clause were consistent only with the creation of a floating charge and dismissed the notion of a trust. The retention of title clause had created equitable charges in four categories of assets: the raw fabric, the proceeds of sale of the fabric, any new product in which the fabric became a constituent and finally any proceeds of sale to the new manufactured products.[594] The provisions of the agreement went far beyond merely retaining title to the goods supplied and embodied something additional than a mere sale.[595] It was also held that the charge was registrable and hence was held void for lack of registration under section 95 of the Companies Act 1948 as it was decided that a floating charge had in substance been created. In the course of his judgement, Slade J stipulated:

'In my judgment, any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge, as the case may be. The existence of the equity redemption is quite inconsistent with the existence of a bare trustee-beneficiary relationship.'[596]

Notwithstanding the apparent significance of this judgement which alludes to the likelihood of provisions of such a sort to be held as creating a charge, by way of security. It can be argued that the judgement does little by way of clarifying or differentiating between legal title and 'equitable and beneficial ownership.' As such, the main point to be inferred from this quotation is that it is not expedient to rely on terms which explicitly claim equitable and beneficial ownership.[597] Slade J does little in providing clarification regarding the circumstances of claiming legal title, a regrettable omission.

[592] *Re Bond Worth Ltd, op cit* fn 470.
[593] W Goodhart and G Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 *The Modern Law Review,* 489-513, at 503.
[594] *ibid.*
[595] *Re Bond Worth Ltd, op cit* fn 470 as per Slade J at [246].
[596] *ibid* as per Slade J at [248].
[597] See further, J Parris, *Retention of Title on the Sale of Goods, op cit* fn 63 at 123.

Despite the terms of the contract purporting to retain equitable and beneficial ownership in the goods for Monsanto, Slade J concluded that the proper manner of construing the retention of title clause was by considering that the clause took effect in two steps: the first step included regarding the clause as effecting a sale for the entire property passing to Bond Worth, followed by 'a security, eo instanti, given back by Bond Worth to the vendor, Monsanto.'[598] Accordingly, Bond Worth had thereby created charges over all the categories of assets comprised in the retention of title clause and as such the seller was regarded as the creator of the relevant charge.[599] The consequences of non-registration in this particular case were financially disastrous as the supplier, ultimately lost his position of priority in the insolvency proceedings and was subordinated to the same position as an unsecured creditor, with little prospect of recovering anything. Furthermore, this case established that a charge will be created in favour of the seller in circumstances where there is an attempt to retain equitable and beneficial ownership of the goods. As per the above judgement, this would constitute creating a charge securing a debt, due to the reason that equitable ownership confers that the goods are held similarly to a trust, until payment is fulfilled.[600] Thus, this case is particularly enlightening with regards to the specific words of the contractual agreement, and any retention of title terms purporting to claim equitable ownership is likely to be construed as creating a charge over the goods in question. Clearly, parties seeking to rely on retention of title clauses must thus tread carefully around this minefield of issues relating to the wording of the contractual clause. Evidently, claiming equitable and beneficial ownership of the goods will render the utility of the retention clause futile as evidenced by *Re Bond Worth,* the supplier's position in insolvency proceedings will be subordinated if the charge is held void for lack of registration. The functionality of retention of title clauses are thus significantly hindered in the situation where the wording of the contractual agreement infers the creation of a registrable charge. Retention of title claimants and their respective draftspersons must draft their agreement cautiously to ensure that their clause is validly effective in retaining title and construed as a true proprietorial claim.

The two step approach adopted by Slade J whereby the contract was construed as first, a sale of the entire property to the buyer, and then secondly as a security, given back by the buyer to the seller, was subsequently followed in the case of *Stroud v John Laing.*[601] The issue of this case was whether

[598] *Re Bond Worth Ltd, op cit* fn 470 as per Slade J at [256].
[599] It is worth noting here that previously it was argued that the theoretical basis for the decision in *Re Bond Worth* was thwarted by the House of Lords in *Abbey National Building Society v Cann* [1911] 1 AC 56, however this argument was nevertheless rejected in *Stroud Architectural System Ltd v John Laing Construction Ltd* [1994] B.C.C. 18 and thus will not be discussed further. See generally, D Turing "Retention of Title: how to get value from a bad penny", *op cit* fn 478.
[600] See also *Coburn v Collins* [1887] 35 Ch D 373.
[601] *Stroud Architectural System Ltd v John Laing Construction Ltd* [1994] B.C.C. 18.

upon a true construction of a contract for the supply of glazing, did the plaintiffs retain title to the goods supplied and thus have sufficient interest in the goods to succeed against the defendants in a claim of conversion.[602] Once again, the retention of title clause in the contractual agreement stipulated that the equitable and beneficial ownership in all the goods supplied or procured would remain with the seller until payment had been received in respect of all sums owed.[603] The provision also referred to the beneficial ownership attaching to any proceeds of resale or to claims for such proceeds. In this case it was held that the legal title passed to the buyer and this created a charge rather than a simple trust, and thus the seller was held as the creator of the floating charge. In the case of *Stroud v John Laing,* HHJ Newey followed the same approach taken in *Bond Worth* in holding that the seller's interest in the goods amounted only to a floating charge, which was held void for lack of registration as per s395 of the Companies Act 1985, the relevant legislation at the time. It was held that retaining equitable and beneficial ownership created a charge granted by the buyer to the seller. Accordingly, from relying on both authorities using a phrase which purports to retain equitable and beneficial ownership, will be construed by the courts as creating a registrable charge and thus, the terms which attempt to retain title will most likely fail.

Having outlined the significance of *Re Bond Worth* – arguably, one of the most important authorities on this prevalent issue of the circumstances where retention of title clauses are not interpreted as merely a contractual agreement specifying when ownership will be transferred, but in fact are inferred as creating a registrable charge. Consequently, the focus of this discussion will now turn to exploring each type of retention of title clause to identify the precise circumstances whereby the court have opted to construe the contractual agreement as one which constitutes a registrable charge. This discussion is important for the overarching hypothesis which argues that retention of title clauses as a functional mechanism are hindered from achieving their primary objective. In this context, the discussion will cast doubt on the effectiveness and utility of aggregation and prolonged clauses when they are inferred as creating a charge, by way of security.

Depending on the type of retention of title clause, in some instances it will be relatively straightforward to deduce that the wording of the clause merely alludes to a proprietary claim, rather than asserting rights by way of security. In the simplest of cases, casting a cursory glance over the wording of the clause will be sufficient to ascertain whether the clause simply specifies how title to the goods will transfer, a function which is rendered valid by virtue of the provisions of the Sale of

[602] *Stroud Architectural System Ltd v John Laing Construction Ltd, op cit* fn 601 at [19].
[603] *ibid.*

Goods Act. However, there are some circumstances as discussed below which blur the boundaries and makes it increasingly more difficult to accurately predict the outcome of the categorisation of the clauses as either a proprietorial claim or a security interest. The difficulty of categorisation can be evidenced by an abundance of cases on this issue, dealing with a vast array of different circumstances. Furthermore, the influx of cases in this area of law makes it especially challenging to achieve a degree of consistency, with different judges employing various rationales for why they interpreted the clause as creating a charge. As such, the following section will consider a wide range of authorities in an attempt to draw possible conclusions of when precisely a retention of title clause will be inferred by the court as creating a registrable charge. In doing so, the discussion will highlight the associated challenges for those seeking to rely on retention of title clause for supplied goods and whether the overall objective and functionality of specific types of clauses are rendered futile. As outlined below, the risk of the title retention terms being construed as a charge is evidently one of the biggest hindrances on retention of title clause as a functional mechanism as clearly the primary purpose of retaining title is significantly impeded. The level of protection usually prescribed by the clauses to sellers is brought to an abrupt end once the clauses have been conferred as a registrable charge, held void for lack of registration. As epitomised by the implications of *Re Bond Worth,* the consequences of the court inferring a registrable charge is financially disastrous for sellers and as such, this issue poses one of the most significant risks for sellers relying on retention of title terms.

The associated drawbacks of retention of title clauses are manifestly exposed in this area of the legal minefield. Parties intending to rely on retention of title clauses in present day need to pave their way through the many pitfalls as identified by the influx of cases, specifically issues relating to prolonged and aggregation retention of title clauses. Arguably, this complicated dividing line between retention of title and registrable charges provides the most apt embodiment for the description of this area of law as a legal minefield, and subsequently, verifies the accuracy of the depiction of this area as 'presently a maze if not a minefield'[604] by Justice Staughton. Thus, the following discussion serves the fundamental purpose of strengthening the main hypothesis of this thesis, which argues that the functionality of retention of title clause is significantly hindered by a wide range of variables, in this context retention of title clauses are impacted by the specific wording of the clauses being inferred as constituting the creation of a registrable charge. As the wording and contextual background of the individual cases is of upmost importance for the categorisation of a registrable charge, greater emphasis will be given to the factual background of individual cases to ensure a comprehensive

[604] *Hendy Lennox Ltd v Grahame Puttick Ltd, op cit* fn 12 as per Justice Staughton at [491].

account of the issues raised. The discussion will start by exploring the simple retention of title clause and whether this type of agreement amounts to a registrable charge.

4.4.1 Simple retention of title clauses

One of the most important factors to consider with simple retention of title clauses, is the fact that the title always remains with the seller. The title to the goods will not pass to the buyer and thus the seller will retain ownership of the goods, until the full purchase price has been paid for by the buyer. This is stipulated by section 19(1) of the Sales of Goods Act 1979, which allows sellers to impose certain conditions for the passing of title. The courts have been consistent in holding that simple retention of title clauses do not constitute charges so far as the retention of title remain confined to the original goods supplied by the seller.[605] Retention of title terms preventing title from passing to the buyer do not make the agreement a security agreement as the buyer is not giving security rights over goods owed by the buyer, but is merely agreeing conditions with the seller as to when the property in the goods is to pass to the buyer.[606] Therefore, despite the function of security, no charge is created by the buyer which requires registration. This was affirmed by the Court of Appeal in *Clough Mill v Martin.*[607]

In the *Clough Mill v Martin* case, the seller agreed to supply yarn to a fabric manufacturing company on credit terms. The contract of sale provided that the seller would retain the title of the yarn supplied until the full purchase price had been paid. The exact wording of condition 12 which included the retention of title provision was as follows:

'However, the ownership of the material shall remain with the seller, which reserves the right to dispose of the material until payment in full for all the material has been received by it in accordance with the terms of this contract or until such time as the buyer sells the material to its customers by way of bona fide sale at full market sale...'[608]

The terms of agreement also stated that if any of the material was incorporated or used as material for other goods before payment had been met, the seller's rights extended to those other goods. The manufacturing company went into receivership, resulting in the seller claiming to be entitled to repossess the yarn it had supplied, while the receiver argued that the clause enabled the property to pass to the buyer, subject to a charge. The key issue in determining whether or not a registrable charge

[605] H Beale et al, *The law of security and title based financing, op cit* fn 529 at 11.
[606] R Goode and E Kendrick (ed), *Goode on Commercial Law, op cit* fn 512 at 22.33.
[607] *Clough Mill Ltd v Martin, op cit* fn 45.
[608] *Clough Mill Ltd v Martin, op cit* fn 45 at [113].

has been created, was not the purpose of the clause establishing security but whether the title did or did not in fact pass to the buyer.[609] If the title of the goods did pass to the buyer, who subsequently confers the seller's rights over the goods, then such rights would constitute a charge.[610] However, if the title of the goods remained with the seller and did not pass to the buyer, then the seller was simply seeking to repossess his goods and subsequently, no registrable charge would be created. The conclusion drawn from the first instance court held that a charge had been created by the company which was invalid for failure to register the charge. The yarn passed to the company on delivery and a charge was created as a means of securing payment of the purchase price.[611]

However, this was overturned by the Court of Appeal. The Court of Appeal took a very literal and detailed approach to the construction of the contractual agreement in providing that the condition merely stipulated that the seller would retain his ownership in the material supplied and thus would simply remain owner of the goods until the buyer had settled the outstanding purchase price of the goods.[612]Accordingly, Robert Goff LJ held: 'under the first sentence of the condition, the buyer does not in fact confer a charge on his goods in favour of the seller; on the contrary, the seller retains his title in his goods, for the purpose of providing himself with security.'[613] Accordingly, the court saw no reason why the first sentence of the condition which merely allowed the seller to retain the legal property in the material, should be construed as giving rise to a charge in favour of the buyer on the unused materials. The simple retention of title clause in this case was upheld, which enabled the seller to repossess the unused yarn supplied to the manufacturer, yarn which had not been paid for.

The court rejected the argument that the simple retention of title should be construed as a charge to provide payment. It was confirmed by the court, that a registrable charge would not be created in circumstances where both parties intended that ownership would be retained by the seller until the full payment of the purchase price. The supplier of the yarn could not be expected to register a charge over its own goods when the buyer never obtained the title of the goods. As such, following the decision of *Clough Mill,* it is generally accepted that simple retention of title clauses are not to be construed as registrable charges.[614] In the situations where the agreement involves merely retaining title to the goods, this will not be inferred as the seller conferring a charge on its own property. Simple retention of title clauses are merely a manifestation of the contractual freedom given to sellers and

[609] A Hicks "Retention of title- latest developments" (1992) *Journal of Business Law,* 1-13, at 1.
[610] *ibid* at 2.
[611] G McCormack, *Reservation of Title, op cit* fn 33 at 110.
[612] *Clough Mill Ltd v Martin, op cit* fn 45 as per Robert Goff LJ at [118].
[613] *ibid* as per Robert Goff LJ at [121].
[614] G McCormack, *Registration of Company Charges, op cit* fn 515 at 73.

buyers by virtue of the Sale of Goods provisions.[615] The simple retention of title clause merely allows the seller to retain ownership of the goods pending the fulfilment of a specified condition and thus, no question of charge by the buyer can arise.

Effective retention of title clauses have been held in other decided cases and have thus, avoided the judicial categorisation of constituting a registrable charge. In the case of *Hendy Lennox*[616], the retention of title clause provided that the title of the goods would remain the ownership of the seller until the purchase price had been paid in full and that the sellers would have the right to repossess the goods (diesel engines) in the event of default failure to pay. Subsequently, Staughton J confirmed that the property would pass when it was intended to pass as pertinent to section 16 and 17 of the Sales of Goods Act. Staughton J contended that the wording of the contractual provision should be given its full literal effect and stated, 'I do not see why the plain words of the contract should not mean what they say.'[617] Accordingly, the sellers retained full rights of ownership of the goods supplied and the contractual provision merely regulated how title to the goods would transfer to the buyer. It was affirmed that the buyers did not confer property rights in the goods to the sellers, as the sellers retained the proprietary rights.[618] As such, the retention of title clause did not constitute a charge, which subsequently would require registration.

The simple retention of title clause does not constitute a charge on the goods of a buyer because the rights are not granted over the buyer's own property for the underlying reason that the goods do not become the property of the buyer until such goods have been paid for.[619] Accordingly, the simple retention of title clause has sufficient authority affirming its validity as merely transferring title rather than creating a registrable charge.

4.4.2 Current account clause

Current account clauses attempt to retain the seller's ownership of the goods supplied, until all the buyer's debts or obligations to the seller, have been discharged. The difficulty with current account clauses is that retaining the title of the goods until an overdue debt has been paid is purported to go beyond the remit of the clause incorporated into the sales contract. As stipulated by McCormack, 'withholding title until a long overdue debt has been paid is creating something over and above what

[615] G McCormack, "Reservation of title in England and New Zealand" (1992) 12 *Legal Studies,* 195-209, at 196.
[616] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12.
[617] *ibid* as per Staughton J at [492].
[618] G McCormack, *Registration of Company Charges, op cit* fn 515 at 75.
[619] D French, *Mayson, French & Ryan on Company Law,* 36th Ed, Oxford: Oxford University Press, 2019, at 311.

was in existence when the clause was first incorporated into the sales contract…thus it is more difficult to disguise as something other than the creation of a security interest.'[620] Retaining title to goods supplied until all pre-existing indebtedness between a seller and buyer has been discharged does suspiciously seem like a security right and thus may explain why such clauses have proved to be quite controversial.[621]

A current account clause was upheld in the case of *John Snow v DBG Woodcroft*[622], in which a conditions of sale provided that the title of the goods would only transfer to the purchaser once the purchaser had met all the indebtedness to the seller.[623] The conditions of sale provided: 'the property in the goods agreed to be sold will only pass to the purchaser when the purchaser has met all the indebtedness to the seller.'[624] The contextual background of this case suggested that 'all the indebtedness' was limited to the single contract in question and as such the clause in question only dealt with one retention of title clause.[625] Despite this, the learned judge treated the clause as a current account retention of title clause. The conclusion drawn from this case was that a current account retention of title clause did not create a charge requiring registration under the Companies Act.

Despite uncertainty surrounding whether a retention of title clause creates a registrable charge, it is suggested that the decision of *Clough Mill* gives support to the view that a current account clause does not constitute a registrable charge.[626] The judges were of the opinion that retaining title to the seller was inconsistent with the creation of a registrable charge by the buyer.[627] Relying on the observations made by Slade J in *Re Bond Worth,* the judges of the Court of Appeal in *Clough Mill* construed the important question as how has the seller's position been secured, and Oliver LJ concluded with the following remark 'if in fact [the seller] has retained the legal title to the goods, then by definition the buyer cannot have charged them in his favour.'[628] As such, this indicates support for the validity of a current account retention of title clause.

[620] G McCormack, *Reservation of Title, op cit* fn 33 at 114.
[621] G McCormack, "Reservation of title in England and New Zealand", *op cit* fn 615 at 199.
[622] *John Snow & Co Ltd v D.B.G. Woodcroft & Co Ltd, op cit* fn 74.
[623] *ibid* as per Boreham J at [62].
[624] *ibid.*
[625] G McCormack, *Reservation of Title, op cit* fn 33 at 105.
[626] G McCormack "All-liabilities reservation of title clauses and company charges", *op cit* fn 514 at 3.
[627] G McCormack, *Reservation of Title, op cit* fn 33 at 115.
[628] *Re Bond Worth Ltd*, *op cit* fn 450 as per Oliver LJ at [123].

In the Scottish case of *Armour v Thyssen*[629], the House of Lords held that a current account clause did not create a charge on the basis that the parties were entitled to agree on any conditions chosen for the transfer of property as stipulated by section 19 of the Sale of Goods Act. The claim in *Armour v Thyssen* was to recover the good supplied. Accordingly, parties are afforded contractual freedom to agree to any terms they see fit for the passing of property. The notion of legal ownership is flexible enough to enable buyers and sellers to agree on which rights and terms meet their commercial objectives and intentions.[630] In this instance case the terms of the contract allowed the seller to maintain title until all debts owed to the seller had been paid for, by virtue of a legitimate retention of title, rather than conferring rights by the buyer of his own property. In summation, the fact that the seller's interest in the goods is defeated upon payment of the debt, does not automatically render that interest as a registrable charge.[631] Accordingly the current account retention of title clause has thus received judicial approval.[632]

4.4.3 Prolonged retention of title clauses

The difficulty arises since prolonged clauses attempt to claim the beneficial interest in not only the original goods but also to the proceeds of sale. As such, under a prolonged retention of title clause, ownership is retained until the buyer has paid the full purchase price to the seller, if goods are subjected to a sub-purchase, then the seller can acquire the ownership to the proceeds of sale or be afforded the right to sue the sub-buyer for such proceeds of sale. Equitable trading rights by operation of law are not registrable as the rights are not conferred or created by the buyer.[633] In situations where the charge has not been created by the buyer, then it is not registrable under the Companies Act. As per the judgement in *Re Diplock*[634], it is possible for equity to declare a charge on a mixed fund comprising of traceable funds and other funds in a bank account. The following was stipulated by Lord Greene; 'the result of a declaration of charge is to disentangle trust money and enable it to be withdrawn in the shape of money from the complex in which it has become involved. This can only be done by sale under the charge.'[635] The tendency of the courts dealing with retention of title clauses purporting to claim proceeds of sale, is that the vast majority of cases the claim has been disallowed

[629] *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339.
[630] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 20.
[631] *ibid.*
[632] See further, W Davies "Romalpa thirty years on- still an enigma?" *op cit* fn 43 at 23 for his commentary on the decision in *Armour* receiving 'high judicial approval.'
[633] G McCormack, *Reservation of Title, op cit* fn 33 at 120.
[634] *Re Diplock* [1948] Ch 465.
[635] *ibid* as per Lord Greene at [547].

on the grounds that such a stipulation creates a charge which is held void for failing to complete the registration process.[636]

The most famous case which conferred the seller the right to proceeds of sale was *Romalpa,* in which the Court of Appeal held that the terms of agreement established a fiduciary relationship between the seller and buyer, which allowed the seller to have an equitable right to the proceeds of sale. The issue before the court in *Romalpa* centred on the construction of the contract rather than the characterisation of the agreement and as such, it was conceded that the buyer was in fact a bailee of the goods. Two main arguments led to the Court of Appeal to favour the seller's position and thus allowed the seller to have an equitable right to the proceeds of sale; firstly the court was strongly influenced by the buyer holding the goods as a bailee for the seller and secondly, the court heavily focused on the implied term which allowed the buyer to sub-sell the goods.[637] The Court of Appeal adopted a literal interpretation to the contractual clause and thus focused on the account of the seller which resulted in granting the seller the right to the proceeds of sale. However, the decision reached in *Romalpa* has been criticised extensively[638], and has been described by Longmore LJ 'as a case more distinguished than followed in subsequent authority.'[639] A more detailed account of the *Romalpa* case and its implications for retention of title clauses and the minefield of issues left in its wake can be found in Chapter Five.[640] Lower courts have consistently bypassed the decision on the basis that *Romalpa* omitted crucial points of argument such as the intention of the parties and the characterisation of the charge, which arguably should have been at the forefront of the discussion but unfortunately had not been given sufficient consideration. Despite subsequent judicial reluctance to *Romalpa* as evidenced by the following cases, the decision in *Romalpa* has neither been reversed nor overruled and as such confers the seller the right to the proceeds of sale on the basis of the Court of Appeal adopting a strict literal interpretation of the contractual agreement. In *Romalpa, t*he Court of Appeal held that the seller retained title until payment and that the construction of the contract indicated that the buyer was accountable to the seller for any proceeds of sale, and that such proceeds were vested in the seller in equity on the basis of the fiduciary relationship between the seller and buyer.

[636] G McCormack, *Registration of Company Charges, op cit* fn 515 at 84.
[637] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3 at [680].
[638] See R Goode and E Kendrick (ed), *Goode on Commercial Law, op cit* fn 512 at 22.34.
[639] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232 as per Longmore LJ at [26].
[640] See section 5.1.1.

The following cases buck the trend set by *Romalpa* in holding that the right to the proceeds of sale must have been assumed by the parties to be construed as a security interest, thus inferring a creation of a charge and in the absence of registration was held to be void against the liquidator and creditors.[641] In the case of *Compaq Computer Ltd v Abercorn Group Ltd*[642], Mummery J held that the seller's interest in the proceeds of sale was determinable on the payments of debts, which therefore created a charge. This reasoning concurs with the statement of Slade J in *Re Bond Worth Ltd,* 'any contract which, by way of security for the payment of debt, confers an interest in property defeasible or destructible on payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge.'[643] A charge is created if the security conferred an interest in the goods that were defeasible upon payment of the debt.

Contracts of sales which include a prolonged retention of title clause, whereby the terms incorporated are extensive and overly elaborate, are the most prone to fail. The reasons behind this generalisation include that complicated and extensive rights purport to extend the seller's property rights further and as such are more likely to be construed as creating a registrable charge rather than merely preventing the transfer of property. This can be illustrated by *Tatung Ltd v Galex*[644], which involved two separate and complicated conditions of sale for supplying televisions and video equipment to the defendants. The first condition of sale stipulated that any proceeds of sale would indefinitely belong to the suppliers. The second condition of sale specified that the defendants had to keep the proceeds resulting from any resales, in a separate account explicitly for the benefit of the suppliers. In this case, the contractual agreement conferred the rights to the proceeds of sale to the suppliers until the purchase price and all sums owed had been paid by the buyer and as the supplier's interest was defeasible upon payment, it was held by Phillips J that in this case, a charge had been created over the proceeds of sale. Furthermore, it was held that the contract had created rights by way of security rather than an absolute interest.[645] The retention of title clause provided that the buyer in this case was to deal with the goods as an agent for the supplier as a means of security for payment of debts. Thus, his Lordship decided that the supplier's rights for proceeds resulting from resales, arose out of a security arrangement created by the buyer and therefore constituted a registrable charge created by the buyer on its book debts.[646]

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[641] R Goode and E Kendrick (ed), *Goode on Commercial Law, op cit* fn 512 at 22.34.
[642] *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484.
[643] *Re Bond Worth Ltd, op cit* fn 450 as per Mummery J at [248].
[644] *Tatung (UK) Ltd v Galex Telesure Ltd* [1989] 5 BCC 325.
[645] D Fox, R, Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials, op cit* fn 42 at 482.
[646] D French, *Mayson, French & Ryan on Company Law, op cit* fn 619 at 311.

Where a seller is attempting to enforce a prolonged clause and claim proceeds of sale of the goods which are mixed with insolvency money, then in order to be successful, the seller must either establish a fiduciary relationship with the insolvency party or establish that the proceeds of sale are subject to a registered charge on book debts. If a fiduciary relationship is established then a charge will not be created.[647] However, if a seller cannot establish a fiduciary relationship, then it is possible for the clause claiming the proceeds of sale, to create a registrable charge which will be subsequently be held void for non-registration as per section 859H of the Companies Act.

Another relevant case which dealt with the situation of purporting to claim proceeds of sale is *Pfeiffer*[648]. In this particular case Pfeiffer supplied wine on retention of title terms to a retailer, who subsequently sold or leased the goods to customers on credit terms. The supplier sought to reserve title to the goods and a proprietary interest in the monies deriving from the proceeds of the sub-sales and leases. The predominant issue of this case was determining the extent of the interest that Pfeiffer had in the proceeds of the sub-sales and leases. Phillips J stated that where a buyer is allowed to sell the goods supplied to a third party in the usual course of business, it is usually suggested that the buyer sub-sold on his own account as a principal, rather than a fiduciary obliged to account for all the proceeds of sale.[649] Due to the fact that the supplier's claim was contingent on the amount of proceeds needed to satisfy the outstanding price, the court held that the contract in question amounted to an equitable assignment of the proceeds of sale which conferred a registrable charge. The interests purported by the contractual agreement was held to be inconsistent with the fiduciary relationship in which a proprietary claim of interest would be based and as such was held to create a registrable charge. As summarised by Gough it was held to be a registrable charge as 'the substance and effect of the assignment provision constituted an agreement by the buyer to assign to the seller future debts owed by sub-purchasers to the buyer up to the level of outstanding indebtedness to the seller.'[650] Thus, the clause constituted an equitable charge on book debts created by the buyer, which was subsequently held void for non-registration. No fiduciary relationship could be established and accordingly the suppliers could not succeed.[651]

[647] See *Re Andrabell Limited, op cit* fn 260.
[648] *Pfeiffer Weinkellerei- Weineinkauf GmbH & Co v Arbuthnot Factors Limited* [1988] 1 W.L.R 150.
[649] W Gough, *Company Charges, op cit* fn 536 at 492.
[650] *ibid* at 495.
[651] The supplier's second ground also failed which purported that the proceeds of sale had been assigned to a factoring house which was held to have priority. However, the scope of the second ground is beyond the remit of this thesis and as such will not be discussed further.

In relation to book debts, the case of *Re Weldtech*[652] can be of further assistance. Weldtech had been supplied welding equipment by a German company, using a retention of title clause which purported to extend to the original goods and any proceeds of sub-sale. Before the fulfilment of payment, Weldtech entered into financial difficult and went into liquidation. The German company sought to recover the welding equipment and a claim for £11,000 representing proceeds of sale, which had been paid into a separate account.[653] In respect of the retention of title clause extending to the proceeds of sale, it was held to amount to a charge on the book debts of Weldtech. Hoffman J held:

'It appears to me plain, on the wording of the clause and, in particular, the sentence 'This transfer takes place only for securing our claims against the purchaser'- that the assignment was, indeed, intended to be by way of charge…it follows that the reservation of title clause is void against the liquidator.'[654] Accordingly, the proceeds were used to meet the claims of Weldtech, who held a registered charge over their book debts and therefore, the German company were not entitled to claim for the proceeds of sale.[655] Thus, it was held that standard terms of sale involving book debts constituted creating a charge, which was subsequently held void due to non-registration. In the case of an individual seeking to claim a clause assigned to book debts, it is suggested that a claim to the proceeds of the sale would likely to be held void against a trustee, unless it is registered as a bill of sale. The Weldtech case is considered to be important in respect of prolonged retention of title clauses, as it confirms that claims purporting to extend to proceeds of sale, will amount to a registrable charge on book debts, pursuant to the Companies Act.[656] Thus, as emphasised by Bridge, 'any rights conferred by the contract over book debts due from the sub-buyer will be judicially characterised as the product of a charge over those debts.'[657] From analysing the case law, it is clear that retention of title clauses attempting to extend to claims involving proceeds of sale will be held void as unregistered charges.[658]

Another difficult issue with retention of title claims is where the contractual agreement was documented in such a way as to conceal the true nature of the transaction as can be seen in the case of *Re Curtain Dream plc.*[659] In this case Curtain Dream a fabric company had sold its entire stock of

[652] *Weldtech Equipment Limited* [1991] BCC 16.
[653] J De Lacy "Reservation of Title and Charges on Company Book Debts: The Death of Romalpa?" (1991) 54 *The Modern Law Review,* 736-738, at 736.
[654] *Weldtech Equipment Limited, op cit* fn 652 as per Hoffman J at [17G-H].
[655] J de Lacy "Reservation of Title and Charges on Company Book Debts: The Death of Romalpa?", *op cit* fn 63 at 737.
[656] *ibid.*
[657] M Bridge et al "Formalism, Functionalism and Understanding the Law of Secured Transactions" (1999) 44 *McGill Law Journal,* 567-664, at 639.
[658] A Hicks "Retention of title- latest developments", *op cit* fn 609 at 6.
[659] *Re Curtain Dream plc* [1990] BCLC 925.

trade fabric to Churchill Merchanting Ltd for cash under a financial arrangement which entitled Curtain Dream to repurchase the stock after a 90 day credit period on retention of title terms. The arrangement stipulated that the stock would remain the property of Churchill Merchanting Ltd until payment was received and the stock would be kept separate from other goods to ensure that the goods would be easily identifiable. Curtain Dream used the proceeds of sale to pay Churchill Merchanting Ltd the original purchase price as well as accrued interest. The stock of fabric remained at Curtain Dream's warehouse for the entire time and as such there was no physical movement of the stock. The nature of the transaction between Curtain Dream and Churchill Merchanting Ltd was analysed as one global transaction. The issue before the court was whether the one global transaction created a mortgage or a charge as security for a loan made by Churchill Merchanting Ltd or whether the transaction was one of sale with a retention of title clause included for the resale of the goods. With regard to the agreement masking its true transaction, Knox J relied on the judgement of Lord Hanworth MR in *Re George Inglefield Ltd:*[660]

'It is old law, and plain law, that in transactions of this sort the Court must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction, the Court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction.'[661]

The court in *Re Curtain Dream plc* held that the true analysis of the relationship of the parties was that of borrower and lender and as such the retention of title clause constituted a charge on the fabric. Once Curtain Dream had transferred the stock of fabric to Churchill Merchanting Ltd there was an obligation on Churchill to retransfer the stock back to Curtain Dream, and for such reasons this arrangement created a charge in favour of Churchill the buyer. The nature of the whole transaction meant that the retention by Churchill of title was not of its own fabric.[662] As the charge had not been registered it was held to be void against the administrative receivers of Curtain Dream. Accordingly, in the instance where retention of title terms are documented in such a way as to conceal the true nature of the contractual agreement, the courts will unveil the conceptual mask and will construe such terms as creating a security interest. The agreement will most likely constitute a charge which will be held void for lack of registration. Evidently, the retention of title clause will be unenforceable in such a situation and parties will not be able to hide behind what appears to be a contract for sale on retention of terms. As evidenced by *Re Curtain Dreams plc,* the court will construe the transaction as it was truly intended, a security interest over the supplied goods.

[660] *Re George Inglefield Ltd* [1932] All ER Rep 244.
[661] *ibid* as per Lord Hanworth MR at [251].
[662] D French, *Mayson, French & Ryan on Company Law, op cit* fn 619 at 316.

As exemplified from the cases above (with the exception of the *Romalpa* case), it is rare for retention of title cases to succeed in which the seller is claiming an interest in the proceeds of sale. However, an interesting comparison can be made between the English courts approach and the Australian case of *Associated Alloys Pty*[663] in which the Australian High Court upheld the effectiveness of a proceeds subclause and deemed that the contractual provision in question did not involve the creation of a charge. In this case the clause stipulated that the buyer was entitled to use the goods in a manufacturing process and that the buyer should hold part of the proceeds in trust for the seller in proportions which reflected the value of the parties inputs.[664] In addition, another case of interest is the New Zealand case of *Len Vidgen*[665]*,* where the seller's claims to the proceeds of sub-sales of goods supplied was once again successful. The clause in the *Len Vidgen* case reserved full legal title in the goods supplied (ski apparel and equipment) and included a provision that the seller would be entitled to the proceeds of sale arising from any sub-sales and constituents of other goods. Barker J scrutinised English cases which dealt with retention of title terms claiming proceeds of sale, by comparing and contrasting the wording of the relevant clauses and the circumstances of each individual case.[666] Barker J distinguished the case of *Bond Worth* on the basis that the supplier failed to retain the full legal title to the original goods supplied. In addition, the learned judge found similarities with *Romalpa* as the claims to proceeds were in respect to goods which remained in an unaltered condition from the time of supply. This rationale was enough for the learned judge to thus distinguish subsequent cases such as *Borden (UK) Ltd v Scottish Timber Products*[667] and *Hendy Lennox* as those claims to proceeds were in respect of goods which had been subsequently altered in some form. Finally, the learned judge in the New Zealand case relied heavily on Robert Goff LJ's remarks in *Clough Mill* which emphasised the need for each retention of title clause to be construed on the basis of its own contextual facts which led Barker J to include that on the balance and consideration of the authorities that there was an obligation to account for the proceeds of sale on the basis of an automatic fiduciary relationship.[668] Both cases are of interest as they juxtapose the decisions reached in the English cases which purport that claiming proceeds of sale is likely to infer the creation of a charge as can be seen in *Re Weldtech, Compaq Computer, E Pfeiffer* and *Tatung.* Indeed, it is evident from the two cases discussed above that Australia and New Zealand view retention of title clauses more favourably[669],

[663] *Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd* [2000] 202 CLR 558 (AUS).
[664] D Fox, R Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials, op cit* fn 42 at 482.
[665] *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349 (NZ).
[666] P Watts, "Reservation of Title Clauses in England and New Zealand" (1986) *Oxford Journal of Legal Studies,* 456-464, at 457.
[667] *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48.
[668] P Watts, "Reservation of Title Clauses in England and New Zealand", *op cit* fn 666 at 459.
[669] G McCormack, "Reservation of title in England and New Zealand", *op cit* fn 615 at 195.

which may suggest that the English approach to proceeds of sale clause is too rigid and is thus hindering the functionality of retention of title clauses.

As such, the above analysis demonstrates the difficulties faced by the courts in determining whether the retention of title terms confers the creation of a registrable charge. The nature of determining whether the contract in question amounts to inferring a registrable charge largely depends on several variables, most notably the particular wording of the clause which is deemed of paramount importance. The rationale may differ on a case by case basis and as such 'it is not easy to state determinative principles on whether a tracing [prolonged] clause constitutes a registrable charge…the authorities speak with forked tongues as it were.'[670] The judgements of the courts pertinent to prolonged clauses are never conclusively straightforward which adds to the complexities and uncertainties surrounding this area of law. In each of the cases discussed above, the court established that the transactions were in substance a charge and not a valid retention of title clause but with varied rationales as to why the courts have reached such a conclusion. As such, from analysing the above cases, it can be presumed that purporting to extend a retention of title clause to proceeds of sale will constitute a registrable charge, but deducing a consistent thread through the minefield of different rationales for why this is the case is notoriously difficult.

4.4.4 Aggregation retention of title clauses

The next section of this chapter will explore the situation where retention of title terms seek to cover products which have been made from the original goods supplied by the seller as well as material belonging to the buyer or alternatively material belonging to a third party. Here the difficulty lies in ascertaining whether the product is intended to belong to the seller exclusively, in which case the interest in the new product is vested to the seller under the retention of title clause, without any grant by the buyer, or whether the seller's interest should be construed as a registrable security interest.[671] This particular area of law is riddled with confusion and is summarised aptly by Oliver LJ in *Clough Mill v Martin:*

'English law has developed no very sophisticated system for determining title in cases where indistinguishable goods are mixed or become combined in a newly manufactured article and, to adopt the words of Lord Moulton in *Sanderman & Sons v Tyzack & Branfoot Steamship Co*[672]*,* 'the whole matter is far from being within the domain of settled law.''[673]

[670] G McCormack, *Registration of Company Charges, op cit* fn 515 at 90.
[671] R Goode and E Kendrick (ed), *Goode on Commercial Law, op cit* fn 512 at 22.35.
[672] *Sanderman & Sons v Tyzack & Branfoot Steamship Co.* [1913] A.C. 680 as per Lord Moulton at [695].
[673] *Clough Mill Ltd v Martin*, *op cit* fn 45 as per Oliver LJ at [124].

As will be discussed in most circumstances the seller's interest for aggregation retention of title clause are limited to a security interest as otherwise the seller would invariably gain a windfall.[674] In effect, in the most common circumstances, when the seller is purporting to claim new products, the seller is not in fact claiming for the right to his original supplied goods but is claiming for something additional, which is suspiciously similar to a registrable charge. Construing the retention of title terms as creating a registrable security interest may be the most appropriate characterisation for these types of situations as will be evidenced by the discussion of various authorities below. The first situation to be discussed concerns where the goods supplied remain separated and identifiable from the new product. In this regard, the original goods supplied have not been destroyed or mixed in the creation of a new product.

4.4.4 (a) Goods which are still separate and identifiable

In situations, where the seller's goods have been assorted with other goods, to the extent where the goods remain identifiable or can be separated from other goods, the separate owners become tenants in common of the mass to the extent of their own contribution. Accordingly, no registrable charge comes into existence.[675] In a manufacturing process, if the finished product incorporated no other material other than the goods supplied in the first instance, there is no reason why the seller's retention of title should fail. If the goods supplied are incorporated with other materials, in a manner which allows the original goods to be separated from the finished incorporated product, then the title of the goods will still remain with the seller. As such, no registrable charge will be created in the above circumstance. This principle can be dated as far back as the early 20th century in the case of *In re Oatway*[676] where Joyce J stipulated that 'it is a principle settled as far back as the time of the Year Books that, whatever the alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material.'[677]

This situation was also briefly alluded to by the Court of Appeal in *Clough Mill v Martin,* however this issue was not the circumstances of the instant appeal. Despite this, Donaldson MR made the following remarks:

[674] See cases such as *Re Peachdart Ltd*, *op cit* fn 124; *Specialist Plant Services Ltd v Braithwaite* Ltd [1987] BCLC 1 (CA).
[675] G McCormack, *Reservation of Title, op cit* fn 33 at 122.
[676] *In re Oatway* [1903] 2 Ch 356.
[677] *ibid* as per Joyce J at [359].

'If the incorporation of the yarn in, or its use of material for, other goods leaves the yarn in a separate and identifiable state, I see no reason why the plaintiff should not retain property in it and thereby avoid the application of section 95.'[678]

As such, in the event that the goods remain separate and identifiable as per the contractual agreement, the seller will still be able to maintain title to the goods supplied and as such, avoid the creation of the charge and the requirement of registration. This rationale was also supported by Robert Goff LJ in the same case who stated that with regard to unused materials, the retention of title merely allows the seller to retain the legal property in the material, and the buyer does not, by way of security, confer on the seller an interest in the property defeasible upon the payment of the debt secured.[679] This notion was also accepted by Bridge LJ in *Borden (UK) Ltd,* in which he stated that if identical goods had been mixed but during the process of manufacture had not lost their physical identity, the rights of the bailee or seller of the goods would be preserved.[680] In this context, the court alluded to a relationship of bailment whereby the buyer gains possession but not title to the goods.

The case of *Hendy Lennox* provides an example of where the seller's proprietary claim to retake diesel engines under a retention of title clause was successful.[681] The sellers had supplied diesel engines to the buyers under a retention of title clause purporting to retain title until the full purchase price of the goods had been paid. The prospect of the supplied diesel engines being incorporated into generating sets, and subsequently sold to sub-buyers was discussed between the parties. It was specified that the process of incorporation would not alter nor damage the engine in any way, and it would be possible to identify the diesel engines by looking at the serial number of the goods. The buyers went into receivership and the seller was claiming a proprietary claim for proceedings in the group of engines. Staughton J gave detailed consideration to the terms of the agreement in light of its full literal effect, emphasising the importance of construing the wording of the clause meticulously in the context of retention of title clause to infer meaning.[682] In *Hendy Lennox,* the court found in favour of the sellers because the diesel engines had not been incorporated fully into the generating set. Consequently, as the diesel engines could be separated from the final product, the engines were capable of operating under the retention of title agreement. Accordingly, Staughton J provided the following statement: 'the proprietary rights of the sellers in the engines were not affected when the engines were wholly or partially incorporated into generator sets…they remained engines, albeit

[678] *Clough Mill Ltd v Martin, op cit* fn 45 as per Sir John Donaldson MR at [125].
[679] *ibid* as per Robert Goff LJ at [119].
[680] *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48 as per Bridge LJ.
[681] This case is one of accession, where the retention of title clause is combined with another provision which prevents the goods from being attached to other goods without the overriding consent of the seller.
[682] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12 as per Staughton J at [491].

connected to other things.'[683] To this end, the title retention provision was capable of operating as intending as the engines had not been incorporated into the final generating set and thus the retention of title claim was effective.

Another case which evidences that it is possible to retain title in the circumstances where goods supplied remain identifiable is *Re CKE Engineering Ltd.*[684] In this case, ingots of zinc were supplied on retention of title terms. The retention of title clause provided that property in the goods remained with the seller until the goods were paid for in full and in the event of the zinc having been mixed or melted in a galvanising tank, ownership of the converted goods would also remain with the seller. Both the buyer and seller were aware of the fact that the ingots of zinc would be immediately added into a tank of molten zinc, a tank which was composed of material supplied by a different seller. The court held that it was intended for the seller to have title to a proportion of the contents of the molten zinc. There had been no practical difficulty in identifying the supplied original zinc as the goods had remained sufficiently identifiable to permit recovery without any damage.[685] The addition of the other materials into the tank had only amounted to a very small percentage (1.5%) which meant that the molten material remained substantially zinc.[686] In addition, as the contents of the tank was largely zinc, the zinc was physically reducible into ingots again, which meant that the goods supplied had retained their original identity per se and thus were sufficiently identifiable to be recovered. Accordingly, the court concluded, 'having regard to the actual words of clause 16 (which demonstrate that CKE was to retain title notwithstanding delivery) and settling those words in the context of the remainder of the clause and the factual context, an objective observer would regard the parties as having agree that CKE could retain title to a part of the bulk molten zinc proportionate to its physical contribution to the whole. I therefore hold that when CGL entered administration CKE had a 'retention of title' claim to 217/265ths of the zinc in the tank.'[687] In doing so, this gave validity to the retention of title clause as merely transferring title rather than being construed as a registrable charge. Although the issue of registration was not raised during this case, the case is still useful in explaining what tends to happen when dealing with goods which remain identifiable. Evidently, the position of a claimant purporting to rely on terms for goods which remain separate and identifiable is relatively strong as they will be able to retrieve the goods and thus rely on the incorporated retention of title clause.

[683] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12 as per Staughton J at [494].
[684] *Re CKE Engineering Ltd* [2007] BCC 975.
[685] *ibid* at [976].
[686] *ibid.*
[687] *ibid* at [976] as per His Honour Judge Norris QC at [26-27].

4.4.4 (b) Goods which are no longer identifiable

One of the most difficult instances involving retention of title clause is where goods belonging to two or more parties are mixed in some form and as such it is incredibly difficult to ascertain the rightful owner of the goods.[688] Attempts have been made to assert the right approach with a degree of precision but nevertheless 'conclusions must be stated with diffidence.'[689] In practice, distinguishing the seller's goods from goods supplied by others is notoriously difficult, exasperated in the instance where the goods have been used in a manufacturing process and have subsequently lost their identity. If goods on retention of title terms lose their identity, it will be exceptionally difficult for a seller to retain title.[690] Most of the cases discussed below involve the issue of mixing, where the goods have been essentially mixed or combined with other goods to the effect of creating a new product. Determining who gains the interest in a newly manufactured product can be problematic, if it is deemed to be the seller than they will have an absolute interest over the new products, otherwise the buyer will acquire title to confer a security interest on the seller. It has been suggested that title retention provision can confer the absolute interest to a new manufactured product upon the seller by way of contractual agreement[691], however in practice and as will be demonstrated below, the courts are more inclined to interfere with parties contractual intention and construe the arrangement as the buyer acquiring title sufficient to confer a security interest on the seller as a chargee.

Despite these cases being concerned with the issue of the mixing, the courts frame the problem as an issue pertaining to loss of identity. This can be demonstrated by the case of *Borden (UK) Ltd*, where resin was supplied on retention of title terms to be used in the manufacturing of chipboard. The Court of Appeal found that the resin had lost its identity once the resin had been incorporated in the manufacturing process and thus, title to the resin was thereby lost.[692] It has been proposed by Webb that the reasoning would have been entirely different had the resin been stored with other identical resin supplied by others, in which case the law of mixing would be applicable and consequently the seller's would have owned the goods in common.[693] In essence, the approach taken by the court is to frame the problem of goods sold subject to aggregation clauses as one of loss of identity.

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[688] See further, D Turing, "Retention of Title: How to get Value from a Bad Penny", *op cit* fn 478. See also, A Hicks, "When Goods Sold become New Species' (1993) *Journal of Business Law,* 485-490.
[689] G McCormack, "Reservation of title in England and New Zealand", *op cit* fn 615 at 203.
[690] D French, *Mayson, French & Ryan on Company Law, op cit* fn 619 at 315.
[691] *Clough Mill Ltd v Martin, op cit* fn 45 at [124].
[692] *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48 as per Bridge LJ at [968], Templeman LJ at [973] and Buckley LJ at [974].
[693] D Webb, "Title and transformation: who owns manufactured goods?" (2000) *Journal of Business Law,* 513-540, at 520.

Whether the goods subsequently lose their identity is a question of fact, which notably invites further difficulties of trying to ensure that decisions promote a degree of consistency in this ever-complicated minefield of goods on aggregated retention of title clause terms. The vast diversity of situations and the need for careful consideration when seeking to answer whether the goods have lost their identity, is encapsulated by the illuminating judgement of Bryson J in the Australian case of *Associated Alloys Pty Ltd v Metropolitan Engineering*[694]:

'The question whether the goods which have been used in some manufacturing process still exist in the goods produced by that process, or have gone out of existence on being incorporated in the derived product is, in my opinion, a question of fact and degree not susceptible of much exposition. When wheat is ground into flour it is reasonably open to debate whether the wheat continues to exit; when flour is baked into bread there could be little doubt that the flour does not. Many examples might be encountered or imagined and each must be addressed separately. Where goods of a homogenous character are mixed co-ownership might be a correct conclusion…whether goods are reducible to the original materials is not simply a matter of physics. Other perspectives have to be considered, including the economic perspective. The scraps of leather produced by cutting up a manufactured shoe could not in reality be regarded as the original leather from which the shoe was manufactured. The stell which would be produced by cutting up the pressure vessel and flattening and the cylindrical parts would not be the steel which Associated Alloys delivered under the sale; it would be scrap metal.'[695]

As emphasised by Bryson J, in most circumstances, it will be relatively straightforward to decipher whether or not goods have lost their identify merely by applying a question of fact. However, further difficulties are apparent when deducing whether the contractual agreements purporting to claim the aggregation retention of title clause, constitute a registrable charge or not. Where seller's goods are manufactured to the point where the goods are no longer identifiable or cannot be physically separated from the goods, the question to be posed is whether this will constitute a charge.

This issue was raised in the case of *Re Peachdart Ltd*[696] which involved supplied leather which was subsequently manufactured into handbags. In this case, the contract of sale purported to retain the property in the leather until payment was received in full, and that the seller should retain the right to resell the leather in the event, where payment was overdue. It was held, that a clause purporting to claim goods manufactured to the point of becoming unidentifiable, is to give rise to a registered charge over the manufactured goods. The court concluded that it must be presumed that once the

[694] *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd* [1996] 20 ACSR 205.
[695] *ibid* as per Bryson J at [209].
[696] *Re Peachdart Ltd, op cit* fn 124.

goods had been appropriated that the parties had intended for a charge to be created over the leather handbags and the partly completed handbags as the seller would cease to have the exclusive title to the leather. The charge would be registrable as a charge on goods or as a floating charge.[697] Thus, in this instance, the charge had not been registered and was therefore held void under the relevant legislation of the time. No further commentary or analysis as to why the court found in favour of construing the clause as a registrable charge was provided by Vinelott J. As emphasised by McCormack 'where the aggregation clause purports to vest title in the seller to products formed partly of materials belonging to third parties, it amounts to a charge over the products.'[698] This follows the reasoning of similar authorities where title to the goods is lost by the manufacturing process including *Bond Worth* where fibre was used for the manufacturing of carpets, and *Borden (UK) Ltd* where resin was used for the manufacturing of chipboard.

Further difficulties arise where the goods supplied have not fundamentally changed their identity but have been merely improved to the point of substantial transformation. As exemplified by Webb, 'a log which is turned into a fine table is still a piece of wood, and a statute made of a block of marble is still a piece of stone.'[699] To this end, the technical change will be more apparent for some types of goods than others, for example it will be abundantly clear that grapes turned into wine produces an entirely new product and thus, it is easier to argue that the grapes cease to exist as fruit.[700] As such, the distinction between retaining title in goods which have improved but have subsequently managed to retain their original identity and goods which have created a new product from the goods supplied, is a fine distinction. Evidently, the law in this area is lacking a clear principle regulating the transformation of goods supplied under an aggregation retention of title clause. The principle in question could clarify when goods have subsequently undergone a transformation by considering numerous relevant factors such as the reversibility of the goods, the economic viability of the goods in deliberating whether such goods have increased in value to constitute the original goods losing their identity etc.[701] However, without a clear over-arching principle, it is exceptionally difficult for this area of law to develop on a consistent basis. The current piecemeal approach does not offer any degree of certainty to those seeking to rely on aggregation retention of title clause or for courts to adjudicate such legal disputes. This fine distinction was recognised in the case of *Modelboard Ltd v Outer Box*

[697] G McCormack, *Reservation of Title, op cit* fn 33 at 126.
[698] *ibid* at 127.
[699] D Webb, "Title and transformation: who owns manufactured goods?", *op cit* fn 693 at 524.
[700] *ibid.*
[701] See D Webb, "Title and transformation: who owns manufactured goods?" *op cit* fn 693 at 525 where Webb contemplates that the test should consider the economic implications rather than the physical nature of the transformation of the goods.

Ltd[702] in which His Honour Hart noted, 'I see no reason why the plaintiff should not retain property in the board so far as it remained identifiable notwithstanding its having had value added to it by the plaintiff's labour and materials, if that is what the contract on its true construction provides.'[703] The true construction of the provision in *Modelboard Ltd v Outer Box Ltd,* led HHJ Hart to conclude that the seller's interest in the new product was created simply by way of security for the satisfaction of the buyer's obligation to pay the price of the original good supplied, which created a charge which ought to have been registered.[704] However, although the fine distinction was alluded to, the judgment of His Honour did not clarify the position as when the goods remain identifiable.

In the circumstances where a new product is manifested from a range of different goods and the title of the new product belongs to the buyer/ manufacturer, the title is transferred to the seller as a means of security for the discharge of a debt, which will most likely be regarded as creating a charge over the goods in question.[705] Consequently, the charge will be held void for non-registration. As the title in the manufactured goods vests in the buyer, this arrangement acts as security on the goods.[706] This arrangement can be exemplified by *Specialist Plant Services v Braithwaite,*[707] in which a company repaired machines and had supplied materials for the process of repair. The repairing company specified a term which purported that the company would retain ownership of machinery which incorporated any materials that they supplied, as security for the debt. The wording of the term clearly indicated that the material used in the repairs would be held security for costs of the repair. During this time, the defendant company who was a customer, went into receivership and had failed to pay the company for the supply of materials. Specialist Plant Services had attempted to claim a proprietary interest in the impugned machinery and acquired an injunction, which preventing any receivers from selling the machinery. The court discharged the injunction as the contract created a charge, equivalent to an unregistered bill of sale which was subsequently held void for non-registration under the Companies Act. In the event where a contract contains a provision that the supplier is given ownership to goods as a surety for full payment for the debt owed by the buyer, this will constitute creating a charge.[708]

[702] *Modelboard Ltd v Outer Box Ltd* [1993] BCLC 623.
[703] *ibid* as per Michael Hart QC at [952].
[704] *ibid* at [953].
[705] G McCormack, *Registration of Company Charges, op cit* fn 515 at 93.
[706] D Webb, "Title and transformation: who owns manufactured goods?", *op cit* fn 693 at 531.
[707] *Specialist Plant Services Ltd v Braithwaite Ltd* [1987] BCLC 1 (CA).
[708] D Fox, R Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials, op cit* fn 42 at 481.

It is difficult to determine whether a charge has been created in circumstances, where a seller through express stipulation has conferred rights in the product which has been manufacturing partly using goods that he has supplied. This issue was raised in *Clough Mill* in which Robert Goff J elaborated further; 'where A's materials is lawfully used by B to create new goods, whether or not B incorporated other material of his own, property in the new goods will generally rest in B…it is difficult to see why, if the parties agree that the property in the goods shall vest in A, that agreement should not be given effect to.'[709] Thus, the learned judges' initial thoughts on the topic was that the court could not envisage any problems in attempting to adhere to the original agreement in such a circumstance. Accordingly 'he failed to see any reason in principle why the original legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and had agreed that it should lie.'[710] However, Goff J later retracted his initial thoughts and provided logical reasoning which effectuated his reasoning behind his withdrawal of opinion. The main rationale referred to the intention of the parties, it is implied that a buyer would not intend for a seller to gain windfall of the purported higher value of the new product.[711] Goff LJ arguing that the parties could not have intended for the parties to have the effect of allowing a seller to gain a windfall of the full value of the new product is significant, as clearly his Lordship is introducing concepts which are applicable to security arrangements, despite claiming that the substantive nature of the arrangement did not amount to a charge.[712] This provides an apt example of the close affiliation with registrable charges and retention of title clauses which causes legal uncertainty for courts. Additionally, it also suggests the court's tendency to interfere with the alleged contractual freedom afforded to parties under the provisions of the Sale of Goods Act, in holding that the parties could not have intended for the words to have meant that the seller would invariably gain a windfall.

In the same case, Donaldson MR also acknowledged the difficulty of the situation of determining who owned the goods of the new product made from incorporated material from other goods:

'Fortunately, we do not have to decide whether the fourth sentence of condition 12 creates a charge to which s95 of the Act of 1948 would apply. I say 'fortunately', because this seems to me to be a difficult question…I should have thought that the buyer was clearly purporting to create a charge on the 'other goods' which would never have been the plaintiffs goods….if the incorporation of the yarn created a situation in which it ceased to be identifiable and a new product was created consisting of the yarn and the other material, it would be necessary to determine who owned that product. If,

[709] *Clough Mill Ltd v Martin, op cit* fn 45 as per Robert Goff LJ at [119].
[710] G McCormack, *Registration of Company Charges, op cit* fn 515 at 96.
[711] *ibid.*
[712] D Webb, "Title and transformation: who owns manufactured goods?", *op cit* fn 693 at 538.

and to the extent that, the answer was the buyer, it seems to me that the fourth sentence would create a charge.'[713]

As such, relying on the Court of Appeal's rationale, it is suggested that the buyer should be the rightful owner of any new manufactured product and the proper construction of the contractual agreement would result in the seller creating a charge over the supplied goods.

On a similar note, in *Clough Mill* the wording of the contractual agreement (condition 12) was of particular significance as it stipulated that the seller would retain property in all the material until the price of that material had been paid in full. The Court of Appeal recognised the implications of the word 'until' which meant that if three-quarters of the material had been paid for, the seller would still be able to retain ownership and have the right to resell the material thus leading to a windfall for the seller as the sum would likely exceed the amount owed by the buyer. Accordingly, Donaldson MR had the following to say:

'I am inclined to think that the word 'until' in the phrase 'reserves the right to dispose of the material until payment in full for all the material has been received' connotes not only a temporal, but also a quantitative limitation. In other words, the plaintiff can go on selling hank by hank until they have been paid in full, but if thereafter they continue to sell, they are accountable to the buyer for having sold goods which, upon full payment having been achieved, becomes the buyer's goods.'[714] Accordingly, a seller may continue to sell the goods up until the point that payment has been met, if the seller were to continue to sell, this would likely infer a creation of charge which would be rendered void for lack of registration.

Up until this point, the various authorities have been concerned with provisions specifying what will happen if the supplied goods are incorporated or manufactured into a new product. However, a further question needs to be posed concerning what happens where the contractual agreement contains no term specifying what is to happens to the goods supplied if such goods subsequently lose their identity? Can the original retention of title clause prevail on the new manufactured product or will this constitute creating a charge over the goods? The case of *Ian Chisholm Textiles Ltd v Griffiths*[715] can be of assistance. This case concerned a seller supplying cloth under a retention of title clause to manufactures of garments. The sellers contended that the retention of title clause applied to the final product- garments, despite no provision stipulating as such in the agreement. In this instance the court held that the supplier's title to the goods created a charge over the garments, a charge held void for

[713] *Clough Mill Ltd v Martin, op cit* fn 45 as per Sir John Donaldson MR at [125].
[714] *ibid* at [126].
[715] *Ian Chisholm Textiles Ltd v Griffiths & Others* [1994] B.C.C 96.

lack of registration. The nature of ownership in the goods changed from beneficial ownership to the interest of a chargee once the goods had changed its identity.[716] Accordingly, if the contract is silent as to the ownership of the products, then the courts are unlikely to infer that the parties intended for the seller to remain the owner of the new product. It is worth noting that in this instance case, the cloth had been combined with buttons, threads and zips, and this was sufficient to indicate that the identity of the cloth had changed by a 'significant extent'.[717] The conclusion to be drawn from this case is that despite the appearance of reversibility and the relative ease of removing buttons, threads and zips from a piece of cloth, the court will most likely not entertain this prospect and will subsequently view the goods as having lost its identity through the manufacturing process. Accordingly, when considering the functionality of a retention of title clause in retaining title to goods supplied, any significant change to the goods including the incorporation of buttons, threads and zips will change the identity of the goods. Clearly, the courts have not laid down a coherent principle as to when goods will lose their identity to a significant degree as to render the goods transformed, and thus triggering the creation of registrable charge. We can only estimate when goods have subsequently lost their identity in the process of manufacturing or wait until the dispute reaches the courts for them to apply a question of fact and reach a palpable conclusion. The passive approach taken to this area of law does not instil any degree of clarity or coherence for those seeking to rely on the clauses in similar circumstances. There is no guidance to follow specifying when goods in a manufactured process are so transformed that they cease to exist as the originally goods supplied and consequently endure a significant transformation resulting in the formation of a new product. Furthermore, the lack of clarity and lack of overarching principles outlining how much change is needed before the goods change and lose their identity, serves to support the argument that retention of title clauses are significantly impeded as a functional commercial mechanism.

Accordingly, once goods supplied have been incorporated with other goods to produce a new product, there are a variety of possible consequences for retention of title clauses. It may be that the retention of title clause no longer applies or that the agreement is only applicable to goods which remain separate and identifiable and if the goods can be retrieved without cause of damage. However, the most common eventuality is that once goods have been mixed, manufactured or processed which results in the creation of a new product, it is exceptionally difficult for a seller to retain title. Thus, title to the newly created product will prima facie vest in the buyer who has created the new product, and not the seller.[718] The seller's interest would only be vested by way of charge, which would

[716] *ibid* at [104].
[717] *ibid.*
[718] D Webb, "Title and transformation: who owns manufactured goods?", *op cit* fn 693 at 513.

subsequently be void for lack of registration under s395 of the Companies Act. In this instance, the title of the supplied goods transfers to a charge on the manufactured product, in which case title has subsequently passed to the buyer and the retention of title clause ceases to be an effective in its objective of retaining title to the original goods supplied for the seller.

The courts have consistently applied the same rules by which title to the goods will be lost where the goods identity has changed in the manufacturing process and title to the new created products will vest in the creator of the product, which will normally be the buyer. However, the cases discussed do not apply a clear or consistent approach to what amounts to a transformation to render the identity of the goods lost and thus, triggering the creation of a charge. It is contended that despite the author believing that the cases have been decided correctly, the cases have been decided without any reference to a clear governing principle and this is the true fallacy. Once again, the law in this area has developed at a gradual and piecemeal basis with no overarching consistent approach, which promotes obscurity in this already complicated area of law. It is apparent that the interest of the seller to goods on aggregation terms will more than likely be conferred as a registrable charge.

In addition, the principal reasoning adopted by the courts is to argue that title to the goods must have passed to the buyer as such a result denies the seller an unwarranted and unintended windfall gain. As evidenced above, the courts heavily rely on the contention that parties would not have intended for the seller to gain a windfall. However, there is a perceived weakness with the windfall argument as the retention of title clause expressly prevents this from happening. Worthington argues that if the contract remains in operation when the seller's rights are exercised, then there can be no windfall gain as title to the goods passes once the price has is paid or alternatively, 'if the contract is repudiated, the windfall gain to the seller may be no more than is appropriate or intended in the commercial context.'[719] Accordingly, relying on the perceived windfall argument is thus flawed. Despite the apparent weaknesses in the courts' rationales, it is evident that there is a general pronouncement that retention of title clauses of this kind are generally unenforceable and the interest of the seller is likely to be conferred as a constituting a registrable charge.

[719] S Worthington, *Proprietary Interests in Commercial Transactions, op cit* fn 11 at 32.

4.5 Conclusion

It is evident that the current law is based on an accumulation of case law and there has been a spate of decisions concerning the different types of retention of title clauses. As demonstrated above, whether the construction of the agreement is inferred as a registrable charge or as a retention of title clause depends on a wide range of variables. A common pattern from all the cases is that one of the most important factors in determining the categorisation of the agreement is the precise wording of what the parties have agreed to with regards to the passing of title. The construction of the contract is thus at the forefront of the court's analysis and consideration. The precise wording of the contractual clause can either facilitate the seller in attempting to retain title or can prove detrimental in inferring a security interest, most notably a registrable charge. As both legal mechanisms perform similar security functions, at times it is difficult to predict with absolute certainty whether the wording of the clause will be inferred as provision retaining title or a registrable charge.

Although some comparisons can be drawn from the courts approach to different retention of title cases, most notably the need to consider any relevant surrounding circumstances to ensure that the court can accurately ascertain the rights of the parties, with great emphasis on the practical effect of any conclusions drawn from the nature of those rights,[720] it is still challenging to categorise the contractual agreements as retaining title rather than inferring a registrable charge. As mentioned previously, one of the main factors for the courts to consider is essentially the construction of a contract and as such, judicial decisions on clauses relating to different contexts may thus be of limited assistance when dealing with a particular case before the courts. The difficulty lies in the fact that despite the vast hoard of authorities on this complicated area of law, it is evident that previous cases deal with very different clauses which have arisen in materially different circumstances. As epitomised by the judgment of Robert Goff LJ:

> 'different cases have raised different questions for decisions; and that the decision in any particular case may have depending on how the matter was presented to the court, and in particular may have depending on a material concession by counsel. So, this is a field in which we have to be particularly careful in reading each decision in the light of the facts and issues before the courts in question.'[721]

Accordingly, it is increasingly difficult to confidently assert that the contractual provision will avoid the implications of creating a registrable charge as such a decision will most definitely depend on a case by case basis with much emphasis on the particular wording of the contractual agreement. This

[720] See further the illuminating judgement of Robert Goff LJ in *Clough Mill Ltd v Martin, op cit* fn 45 at [116].
[721] *ibid* as per Robert Goff LJ at [114].

incoherent approach to cases has the detrimental impact of complicating the legal issues unnecessarily and would thus, benefit from general overarching principles or guidelines outlining at what point do goods lose their identity in the context of an aggregation retention of title clause.

As we have seen, different rationales are provided by the courts for materially different circumstances which makes it difficult for this area of law to be coherent and uniformed in laying down precisely when do retention of title clauses constitute registrable charges. Due to the different rationales employed by the courts in justifying the categorisation as a security interest, it makes it almost entirely impossible to produce and adopt one consistent approach for this area of law. It is self-evident that the body of law in this area is not internally consistent. As such, predicting the circumstances with any degree of certainty as to whether the retention of title will be effective in merely transferring title is notoriously difficult. On account of the inherent complexities and influx of case law, trying to enforce stable reasoning within cases is bound to be extremely difficult.[722]

Despite the courts in *Clough Mill* and *Hendy Lennox* implying that the wording of the retention of title clause should be given its full literal effect. It goes without saying that it is almost impossible to draft prolonged and aggregation clauses in a manner which the courts will enforce. As evidenced above, the courts have strained to prevent the clauses from operating as intended, preferring to interfere with parties contractual intentions and repeatedly construing such clauses as creating a registrable charge, which ultimately suggests an innate suspicion of the clauses.[723] The consistent approach of striking down such clauses as conferring a security interest over the goods supplied causes significant practical problems for those parties seeking to rely on such clauses, as they will almost certainly be destined to fail. As supported by Webb, 'rather than making a sweeping pronouncement that such clauses are unenforceable, the courts have, in common law fashion, responded in an ad hoc way by obstructing the attempts of the parties to implement such contractual provisions.'[724] The piecemeal and fragmented approach taken by the courts to this area of law, merely serves the court's ability to obstruct the enforceability of such clauses and intrude on the contractual intentions of the parties relying on title retaining provisions. Possible reasons behind the judicial reluctance to prolonged and aggregation clauses may include that the courts are preventing retention of title claimants from benefitting in yet another way which allows them to gain priority over unsecured creditors' and

[722] A Knight "Reforming the English law of secured transactions in personal property" (2010) 4 *Law and Financial Markets Review,* 553-567, at 533.
[723] D Webb, "Title and transformation: who owns manufactured goods?", *op cit* fn 693 at 538.
[724] *ibid* at 539.

secured lenders claims.[725] If the courts were to regularly enforce prolonged and aggregation retention of title clauses, then this combined with the super-priority status afforded to retention of title claimants would mean that in the event of an insolvent buyer, the seller would be granted priority ahead of other creditors' and would potentially benefit from obtaining a windfall at the expense of those creditors' who have an economic interest in the goods supplied.[726] To this end, it is suggested that the courts are attempting to strike an appropriate balance to the priority afforded to retention of title claimants with regard to the original goods supplied, which subsequently benefits the position of receivable financiers.

The lack of consistency adopted by the courts as seen in the different approaches taken to claims of proceeds of sale under *Romalpa* and subsequent authorities[727] and the fundamental weakness of not having an overriding governing principle clarifying when goods have lost their identity to a significant degree, significantly impacts on the functionality and commercial worth of retention of title clauses. This area of law is still inherently problematic as no coherent guidance exists to resolve the most significant issues as to when the interest in the goods will vest in the seller, amounting to the creation of a registrable charge. This raises the fundamental question of the overall effectiveness of retention of title clauses as clearly the expected objective of the clauses is hindered significantly once the goods have lost their physical identity or the agreement is inferred as creating a registrable charge. Which begs the question, do aggregation retention of title clause serve a meaningful purpose, if the protection offered is only available in such limited circumstances? Should aggregation and prolonged clauses continue as a commercial mechanism if under most circumstances, they will be construed as creating a registrable charge? It cannot be refuted that the courts have placed impossibly high requirements for claimants to succeed in claims of aggregation and prolonged retention of title clauses. The courts almost always interfere with the contractual autonomy of the parties whereby parties are prevented from implementing their contractual intentions of retaining title to goods supplied. Accordingly, the current judicial trend almost guarantees that such clauses are doomed to fail.[728]

It is argued that this line of argument, supports the underlying hypothesis of this research that retention of title clauses as a commercial mechanism are significantly hindered by the present law and

[725] See Chapter 2 for a discussion on the courts' alleged balancing exercise regarding retention of title clauses.
[726] L Gullifer, "Retention of title clauses: a question of balance", *op cit* fn 209 at 287.
[727] *Pfeiffer Weinkellerei- Weineinkauf GmbH & Co v Arbuthnot Factors Limited*, *op cit* fn 648*; Tatung (UK) Ltd v Galex Telesure Ltd*, *op cit* fn 644; *Compaq Computer Ltd v Abercorn Group Ltd*, *op cit* fn 642.
[728] A Hicks "Reservation of Title: A Pious Hope", *op cit* fn 173 at 80.

the court's inconsistent approach to goods losing identity which prompts a creation of a charge over the goods supplied. Despite the fact that retention of title clauses are in widespread use, in practice the legal mechanism offers less protection than originally expected as clearly there is an abundance of authorities whereby the clauses are struck down as registrable charges and subsequently held void for lack of registration. Consequently, once the clause has been struck down for constituting a registrable charge, the claimant will be reduced to the ranks of the unsecured creditor – an incredibly precarious position. The growing emergence of the clauses not offering the expected level of protection has thus come to light, and the following chapter will explore this issue further, considering the situations where retention of title clauses contracts are construed as contracts of agency or *sui generis* contracts and the corollary implications of further uncertainty in relation to the functionality of retention of title clauses.

CHAPTER 5: UNCERTAINTY OF RETENTION OF TITLE JURISPRUDENCE

5. Introduction

In recent times, the breadth of litigation surrounding retention of title clauses cases has led to great uncertainty. On account of retention of title clauses being a contractual provision, the development of law in this area has been understandably piecemeal in nature. Given the increase in popularity of such clauses[729], the courts have had to interpret the ever-developing nature of retention of title clauses which seek to provide the unpaid seller with a security interest over the goods sold. Over the years, such clauses have become more extensive and ambitious in trying to provide greater security for the unpaid seller in the event of a buyer's insolvency. A large number of sellers incorporate retention of title clauses as part of their standard contractual terms in tandem with equally complicated provisions such as; instructions on how to store the goods in a separate place allowing the goods to remain readily identifiable, provisions allowing the buyers to use the goods in the ordinary course of business, provisions which allow the buyer to resell the goods in the capacity as the seller's agents and provisions which entitle the seller to proceeds of sale and so forth.[730] Therefore, the court must exercise a degree of caution when examining retention of title cases, as each decision is reached by virtue of its particular wording of the contract and considered in light of the commercial context in which the dispute has arisen.[731]

Despite the need to construe the wording of each retention of title clause on an individual basis, it can be claimed that the courts have followed a reasonably consistent interpretation of the wording of retention of title clauses, with emphasis on commercial sense.[732] To clarify this further, it appeared that retention of title cases were dealt with in a similar manner, to the extent of allowing some form of commercial certainty and predictability.[733] Predictability in this regard related to both predictability in terms of judicial outcomes and the stability of the legal and commercial framework.[734] Cases which consider the interpretation of retention of title clauses have been consistently used as a means of providing guidance for both courts, practitioners and contracting parties alike, ensuring a form of

[729] It is exceedingly common for sellers to include retention of title clauses within their contracts of sales of goods in tandem with further complicated provisions. See J Davey and C Kelly "Romalpa and Contractual Innovation", *op cit* fn 5 at 384 for interesting theories on the proliferation of retention of title clauses.
[730] M Clarke, R Hooley, R Munday, L Sealy, A Tettenborn and P Turner, *Commercial Law: Text, Cases and Materials,* 5th Ed, Oxford: Oxford University Press, 2017, at 497.
[731] *Clough Mill Ltd v Martin, op cit* fn 45 as per Robert Goff LJ.
[732] See L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 564.
[733] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 1.
[734] J Yap "Predictability, certainty, and party autonomy in the sale and supply of goods" (2017) *Common Law World Review* 46(4), 269-286, at 269.

market certainty. Evidently, decisions were reached which facilitated the commercial needs and expectations of the market in conjunction with producing fair results which contributed to economic outcomes.[735] To this end, a degree of consistency was upheld within the market, whereby courts would interpret the wording of a retention of title clause in way which allowed for commercial certainty. For example, courts have been willing to uphold simple retention of title clauses with the rationale that such provisions merely postpone the passing of property under the contract.[736] Whereas the courts have repeatedly refused more extensive retention of title clauses, particularly those provisions which seek to allow sellers to uphold an interest in the proceeds of sale.[737] As discussed in an earlier chapter, the courts regularly characterise such provisions as being a registrable charge.[738] The requirement of registration is stipulated in s859A of the Companies Act 2006.

Undeterred by the court's approach to more complicated retention of title provisions, sellers still to this day attempt to include more extensive retention of title provisions which seek to widen their interest, in the hope that the courts will one-day uphold the wording of the 'perfect' clause, which will grant sellers an interest which will not result in a registrable charge; a non-registrable interest per se. This sought-after objective was achieved by the sellers in *Caterpillar (NI) Ltd (formally known as) FG Wilson (Engineering) Ltd v John Holt & Co Ltd*[739] (henceforth *Wilson v Holt*) but unknowingly such decision reaped some unintended consequences. Upholding a non-registrable interest in the proceeds of a sub-sale came at the price of preventing the seller from doing what it had intended to do, which was to bring an action for the price of the goods. Consequently, such a decision also detrimentally impairs the commercial utility of retention of title clauses by preventing sellers from being able to bring an action for the price of the goods in similar circumstances. Once again, the analogy of this area of law as a legal minefield holds acute significance in this context as difficult cases have exposed pitfalls and uncommercial implications of relying on retention of title clause as a mechanism which offers a lifeline in times of economic hardship. Therefore, this chapter will seek to argue that diverging from the reasonably consistent pattern of interpretation has come at a difficult compromise for sellers purporting to rely on retention of title clauses. Following a number of complicated retention of title cases, old and newer cases, it is apparent that such legal outcomes and reasonings have led to consequences that are commercially flawed and do not result in viable solutions.

[735] R Goode, *Commercial Law in the Next Millennium,* London: Sweet & Maxwell, 1998, at 8-31.
[736] See *Armour v Thyssen Edelstahlwerke AG*, *op cit* fn 629.
[737] See *Tatung (UK) Ltd v Galex Telesure Ltd, op cit* fn 644; *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.
[738] The registration requirement is found in s859A of the Companies Act 2006 .
[739] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232; [2014] 1 W.L.R 2365 Also known as *Caterpillar (NI) Ltd (formally FG Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd*.

The decisions of the three cases discussed below, appear fragmented from the commercial reality in which these clauses operate. The emphasis on commercial certainty has been compromised by decisions which have achieved far-reaching and uncommercial implications.[740] This approach to case law, complicates matters for future retention of title cases as any interpretation of such contracts will be subjected to a series of individual and isolated decisions, which may detrimentally impact the court's ability to provide flexibility or ingenuity with commercial decision-making. As emphasised by Gullifer, 'rather than an overarching view being taken of the balance that should be reached between creditors…the development of the law is at the mercy of the ingenuity of those drafting contracts (who seek to get the best of all worlds) and the vagaries of which cases come before the courts and in what circumstances.'[741] As will be discussed, further uncertainty emanates from an influx of controversial legal reasoning in recent case law. It is evident that the uncertainty of this area of law has detrimental ramifications on the functional use of retention of title clauses in commercial transactions. This chapter will critically analyse three examples of difficult retention of title cases which in the author's opinion have inherently increased the overall ambiguity of this area of law. As will be demonstrated, these three cases have caused unprecedented disruption to the effectiveness and utility of retention of title clauses.

The first case to be analysed will be the infamous *Romalpa* case, and how this decision started a pattern for future uncertainty for retention of title clause cases. The second case to be analysed will be *Wilson v Holt*, in which its legal and commercial implications will be evaluated. The third and final case to be explored is *PST Energy 7 Shipping LLC v O W Bunker Malta Limited*[742] (henceforth *Bunkers)* in which its profound impact on sales law and the consequent implications on the functionality of retention of title clauses will be critically analysed. Areas of legal uncertainty, inconsistency and unpredictability will thus be highlighted to illustrate the difficulties encountered when seeking to rely on retention of title clauses, following the decisions of these three controversial cases. As such, this chapter will support the underlying hypothesis that retention of title clauses are impeded from achieving their functional objective of providing an economic lifeline for suppliers in times of economic recession. Accordingly, this chapter will argue that the functional use of retention of title clauses has been significantly limited by the current legal position following the decisions in both *Wilson v Holt* and *Bunkers.*

[740] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 1.
[741] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 250.
[742] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112.

5.1 A reasonable and commercial pattern?

Before delving into the discussion on the cases which are in the author's submission commercially flawed, it is imperative to lay out a brief groundwork for the pattern of consistency of retention of title cases. It is hoped that by briefly alluding to the cases which conform with commercial sense, that it will be easier to illustrate how the following three cases refute and hinder the commercial functionality of retention of title clauses.

As highlighted above over the last few decades, retention of title clause cases have followed a relatively sensible pattern of interpretation.[743] The pattern can be summarised briefly as follows: simple retention of title clauses are deemed valid without registration if the clauses purport only to reserve title of the actual goods supplied, until either full payment of the goods has been met or until the buyer has paid all outstanding debts to the seller.[744] In relation to situations where the original goods have been made into manufactured products, the retention of title clause is unlikely to be effective unless the contract of sale expressly specified that the seller is to have an interest in the manufactured goods.[745] In such circumstances where the goods have been manufactured or altered in some form, the contracts have been characterised as contracts for the sale/ supply of goods. It is common for the courts to infer a charge, despite the seller's attempt to draft the contract of sale with a clause purporting to reserve property in the goods.[746] However, where the seller purports to reserve title in either the money or in any proceeds of sale arising from the original goods, in practice such clauses have been inferred as creating a charge.[747] For example, from previous cases such as *Re Bond Worth* we understand that any interest granted to sellers will most likely be categorised as a registrable charge. The court is also unlikely to confer a seller an interest to account, in situations where the clause does not mention any proceeds of sale nor manufactured goods.[748] Once again, such

[743] The argument put forward here is that prior to the decisions of both *Wilson v Holt* and *Bunkers,* the law pertaining to retention of title clauses appeared to have settled. For supporting viewpoint see W Davies "Romalpa thirty years on- still an enigma?" (2006) 4(2) Hertfordshire Law Journal, 2-23, who stated: '*The law of ROT does now appear to be settled. Suppliers can be advised that proceeds and manufactured goods clauses will fail. Subject to its incorporation in the contract however, a simple clause will usually be effective. Perhaps more surprisingly the all monies clauses has also received high judicial approval. Although the route by which this point has been reached defies any meticulous analysis, this modern certainty is to be welcomed.'*

[744] See *Armour v Thyssen Edelstahlwerke AG*, *op cit* fn 629.

[745] *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48.

[746] M Bridge, *Personal Property Law,* 4th Ed, Oxford: Oxford University Press, 2015, at 288.

[747] *E Pfeiffer Weinkellerie-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd, op cit* fn 648.

[748] *Hendy Lennox (Industrial Englines) Ltd v Grahame Puttick Ltd, op cit* fn 12.

an interest will be categorised as a registrable charge with the result of being rendered void for lack of registration.[749]

One of the general conclusions to be drawn from the above summary is that the interest of the seller and whether a charge has been created is at the foremost issues for the courts to consider. This is fundamental in ascertaining the intention of the parties and subsequently whether to uphold a retention of title clause. The courts must contemplate the intention of the parties when deliberating whether a registrable charge had been created. The significance of this is encapsulated by Hudson, who states 'the crucial thing in most retention of title cases is the proper interpretation of the rights and obligations of the parties *inter se* and the appropriate characterisation of their resulting relationship.'[750] One of the issues is whether or not the contractual provision amounts to a legitimate retention of title or does it create a security interest characterised by a charge? Whilst it is certainly possible for a seller to register each individual charge, there are a few implications which hinder the practical realities of complying with the registration process.[751] Most notably, the level of protection afforded by the availability of a security charge is illusory, although it is supposed to offer the seller some form of protection, the compliance with the registration process has some fundamental difficulties.[752] It is submitted that under the present registration regime, it is highly impractical for retention of title sellers to register each individual charge as firstly this would be uneconomic if the goods supplied are of small commercial value; the cost of registration would far outweigh the commercial worth of the goods. Secondly, as retention of title clauses are widely used it is highly probable that several repeated contracts are used, which would once again be impractical and too costly for a seller to register such charges. Therefore, this raises the fundamental question of why is it important for the law to ascertain whether the interest confers a registrable charge which will most likely be held void for lack of registration? In the instance whereby a registrable charge will be held void for lack of registration, this will be held void against any potential liquidators, administrators, and other creditors. In this respect, such measures can be seen as a providing a counterweight to the priority afforded to retention of title claimants in the event of insolvency[753] and can be considered a

[749] See *Re Peachdart Ltd, op cit* fn 124*; Modelboard Ltd v Outer Box Ltd, op cit* fn 702.
[750] G McMeel, "On the redundancy of the concept of bailment" in A Hudson, *New Perspectives on Property Law: Obligations and Restitutions,* London: Cavendish Publishing Limited, 2013, at 276.
[751] See in particular Chapter 4 and section 7.3.1 respectively.
[752] J De Lacy, "Romalpa revalued?" (1993) *Conveyancer and Property Lawyer,* 375-382, at 375. For an interesting observation, see the approach taken by the Supreme Court of Queensland in *Puma Australian Ltd v Sportsman's Australia Ltd* Unreported, December 7, 1990, Moynihan J (No. 346 of 1990) where the court favoured upholding the proprietary interest of the seller despite the disposal of goods by the buyer. This approach was chosen over construing the clause as a registrable security charge.
[753] As discussed previously in Chapter 2 and see in particular section 4.5.

satisfactory resolution for long-term receivable financiers.[754] As such, striking down cases for lack of registering a characterised charge is fundamentally important for interpreting retention of title clause cases as it upholds a degree of legal certainty and aligns with the commercial expectations of the parties and conforms with the decisions of previous retention of title cases.[755]

5.1.1 *Romalpa* and its repercussions

The first and most famous instance which led to an unsatisfactory interpretation of retention of title clause was the decision reached by the Court of Appeal in *Aluminium Industrie Vaasen v Romalpa Aluminium Ltd*[756] *(*henceforth *Romalpa)*. The Court of Appeal's reasoning has been subjected to considerable criticism[757] and it is not the purpose of this section to highlight or repeat every notable criticism of the case. But rather the aim of this section is to illustrate a few fundamental issues with the reasoning and the approach taken in *Romalpa,* a rationale which has subsequently been relied upon directly or indirectly by courts in their pursuit of dealing with complicated retention of title clauses cases. It can be argued that although later cases have not concurrently followed the decision reached in *Romalpa*[758]*,* the courts have clearly been influenced by elements raised in the reasoning. As discussed below, adhering to such an approach can be inherently problematic and has led to detrimental and uneconomic implications.

A brief overview of the facts will be provided before examining some of the pivotal criticisms of the Court of Appeal's reasoning and its implications for subsequent cases. Aluminium Industrie Vaaseen BV (the seller) sold aluminium to Romalpa (the buyer). The contract of sale contained an elaborate retention of title clause which stipulated that property in the goods would not pass until all payments due to the seller were met as stipulated by clause 13:

> 'the ownership of the material to be delivered by AIV will only be transferred to the purchaser when he has met all that is owing to AIV, no matter on what grounds.'[759]

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[754] L Gullifer "Retention of title clauses: a question of balance", *op cit* fn 209 at 288.

[755] As discussed in Chapter 4. Despite the author believing that these historic cases have been decided correctly, the author criticises the courts lack of clear governing principle and corollary piecemeal approach to the types of retention of title clauses in question. The omission of a consistent approach to such cases has caused historic uncertainty and has ultimately resulted in a proliferation of cases reaching the courts to decide whether such cases are in fact true retention of title clauses or an interest most likely to be conferred as a registrable charge.

[756] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3.

[757] See further, A Hicks, "Romalpa is Dead" (1992) 13(11) *Company Lawyer* 217-218, at 217.

[758] See *Tatung (UK) Ltd v Galex Telesure Ltd, op cit* fn 644; *Modelboard Ltd v Outer Box Ltd*, *op cit* fn 702; *Pfeiffer GmbH v Arbusthnot Factors Ltd* [1998] 1 W.L.R 150.

[759] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd*, *op cit* fn 3, at [679].

The clause continued by specifying that until the date of payment, the buyer acting as a fiduciary owner for the seller should store the aluminium supplied separately, so as to clearly identify that such property was the property of the seller. The contract of sale also provided that if the buyer should make objects from the aluminium supplied, that once again the seller would be given ownership of the new objects as surety of payment. Additionally, the contract also stipulated that the seller would be entitled to sell such objects and hand over all claims arising from the sale to the seller if still unpaid.

It is clear that the retention of title clause was extensive and notably, exceptionally onerous on the buyer. From the above provisions, the buyer would not be entitled to use any proceeds in its business for any other reason than paying back the seller. Subsequently, the buyer went into liquidation, owing the seller more than £122,000. The seller was entitled to reclaim the goods themselves but commenced proceedings against the proceeds of sale of the goods which the seller was claiming it was entitled to. The seller claimed they were entitled to a charge on the money which amounted to roughly £35,000, which was held in a separate bank account by the receiver and to subsequently trace the proceeds of the sub-sale of the property in that particular account.

The Court of Appeal upheld the elaborate retention of title clause and held that the seller was entitled to trace and recover the proceeds of the sub-sales. Two main arguments led to the Court of Appeal to favour the sellers' position; firstly the court was strongly influenced by the buyer holding the goods as a bailee for the seller and secondly, the court focused on the implied term which allowed the buyer to sub-sell the goods.[760] Put simply, by taking a literal interpretation to the contractual clause, the court focused on the account of the seller, which resulted in the seller having a right to the proceeds of sale.

Despite the negative repercussions and criticisms, it is evident that certain principles and justifications cultivated in *Romalpa* have clearly transcended into later cases, again with unintentional consequences for this area of law. Foremost, the outcome of *Romalpa* has evidently shaped the intentions of draftsmen and sellers purporting to rely on retention of title clauses. As noted by Low and Loi, 'ROT clauses burst into the collective consciousness of English businessmen following the Court of Appeal decision in *Romalpa* in 1976.'[761] Therefore, it is not just the judiciary who have been influenced in some capacity by this notorious case. A repeated pattern has emerged whereby sellers,

[760] *ibid,* at [680].
[761] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 233.

suppliers and draftsmen all seek to mimic the alleged success of what was achieved in *Romalpa.*[762] Accordingly, with sellers attempting to fall within the limited ambit of the decision in *Romalpa,* difficult cases have emerged which has brought further uncertainty and complications to the law relating to retention of title clauses. Controversial decisions have been reached which detrimentally hinder the commercial utility of retention of title clauses and the root of the problem can be sourced from the approach taken by the Court of Appeal in *Romalpa;* which provided the first time for a retention of title clause to be upheld.[763]

Although subsequent cases have dealt with *Romalpa* through vehemently distinguishing the case[764], there has been calls for the decision to be conclusively overruled to prevent any further misconstrued interpretations of retention of title clauses cases.[765] This section will contend that the reasoning of the case was unsatisfactory and should be once and for all revoked as to prevent any further unclarity for future retention of title cases. From the case examples provided below, the courts have inadvertently been influenced by some of the inadequate reasonings adopted in *Romalpa,* which has subsequently led to additional complications on the commercial utility and functionality of the clauses.

5.1.2 Literal interpretation of the contractual provision

It is submitted that one of the main criticisms of the Court of Appeal's decision was taking an overly literal approach to contractual interpretation. Although it is recognised that of course a court should construe the wording of each retention of title clause, clauses should not be interpreted in isolation and should not be prioritised over taking a holistic approach to case in hand; the court must dedicate sufficient time in deliberating all relevant aspects of the case. In this instance, the court primarily focused on the precise wording of the contractual provisions of clause 13, to the detriment of disregarding the need to characterise the interest of the seller. In this regard, great focus was given to whose account the sale was for, seller or buyer. Interpreting the case from the account of the seller would entitle the seller to a right to the proceeds, or alternatively interpreting the clause from the account of the buyer would lead to the conclusion that the seller was an unsecured creditor. The Court of Appeal took the unusual approach of favouring the position of the seller on the caveat that it would be contrary to the interpretation of the clause for the seller to be construed as an unsecured creditor.

[762] M Kerr "Modern Trends in Commercial Law and Practice" (1978) 41(1) *Modern Law Review,* 1-24, at 9.
[763] I Davies, *Effective Retention of Title, op cit* fn 6 at 11.
[764] See further *Re Bond Worth*, *op cit* fn 450 at [264]; *Borden (UK) Ltd v Scottish Timber Products Ltd*, *op cit* fn 48 at [38], *Re Andrabell Ltd, op cit* fn 260 at [415].
[765] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 573.

The court's direction of omitting the characterisation of the interest of the seller, was deemed a peculiar direction to take, considering the buyers appeared to be insolvent by the fact that a receiver and manager had been appointed by the buyer's bank.[766] Although it is acknowledged that this was fleetingly alluded to by Mocatta J at first instance, the characterisation of the interest of the seller was dismissed on the ground that a claim to trace the proceeds of sale would not be registrable. It is evident that the court was heavily influenced by the argument that it would be in direct contradiction of the purpose of a retention of title clause for a charge to be created. As affirmed by Goff LJ 'the difficulty so imported is not enough to drive one to imply a term defeating the whole object of clause 13.'[767] Thus, the clause was construed as one for the account of the seller, rather than the account of the buyer as to not be in direct contradiction of the objective of the retention of title clause agreed by both parties.

Such a reasoning was heavily questioned by Phillips J in the subsequent case of *Tatung.*[768] Phillips J respectfully questioned the reasoning adopted by Mocatta J in holding that no registrable charge was created. He distinguished the approach taken in *Romalpa* which was heavily influenced by the argument that it would be in direct contradiction of the purpose of a retention of title clause for a charge to be created. Phillips J opined that inferring a charge was not contradicting the underlying objective of a retention of title clause as 'while that object makes it desirable for the seller to acquire an interest in the proceeds of sale or other disposal of goods supplied by way of security, it does not require that the seller be free of the obligation to register that interest…'[769] It is contended that in the situations where a seller is purporting to claim the proceeds of sale arising out of supplied goods, the correct interpretation is to infer that a registrable charge has been created.

Arguably, the characterisation of the charge should have been at the forefront of the discussion in the *Romalpa* case. As emphasised by Goodhart 'in [*Romalpa]* the question which has been at the heart of most subsequent litigation about reservation of title clauses- namely, whether the clause constitutes a charge on the goods which will be void if not registered under (Part III of the Companies Act 1948- was never raised.)'[770] As aforementioned, the relevant registration requirement is now found in s859 of the Companies Act 2006. It is evident that insufficient attention was given to this important aspect

[766] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 574.
[767] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3, as per Goff LJ at [692].
[768] *Tatung (UK) Ltd v Galex Telesure Ltd, op cit* fn 644 as per Phillips J at [337].
[769] *ibid.*
[770] W Goodhart "Clough Mill Ltd v Martin- A Comeback for Romalpa?", *op cit* fn 593 at 96.

in the *Romalpa* case and ironically, had the Court of Appeal focused on the characterisation of the interest of the seller, it is highly probably that the interest would be deemed a registrable charge, which would be subsequently void against the liquidator and creditors. Thus, conforming to the usual pattern of interpreting retention of title clause in a conceptual and formalistic manner with emphasis on commercial certainty.[771]

This misconceived prioritisation of contractual interpretation whilst subsequently not paying sufficient attention to the categorisation of the seller's interest was also observed in *Wilson v Holt.*[772] Clearly, the approach taken in *Romalpa* set a dangerous example as will be discussed below, which has led to subsequent cases following the same misguided direction, leading to further inconsistency with the interpretation of retention of title clauses.

5.1.3. Disregarding the intention of the parties

Another criticism of the *Romalpa* reasoning, stemmed from the court's reluctance to consider the intentions of the parties. The purpose of the elaborate clause was to provide the sellers as far as possible, a form of security in the event of a buyer's insolvency and to mitigate the risk of the buyer's non-payment. This fact is not disputed and was recognised by Roskill LJ who conceded, 'it is obvious…that the business purpose of the whole of this clause, read in its context in the general conditions, was to secure the plaintiffs, so far as possible, against the risks of non-payment…'[773] As aforementioned, the court was strongly influenced by the opinion that inferring a charge must be contrary to the underlying objective of the retention of title clause as stipulated in clause 13. As such the Court of Appeal was of the view that it was not the parties' intention for a charge to be created as this would allegedly defeat the purpose of incorporating such a clause in the first place.[774] The following section will provide an alternative argument for why this interpretation is inherently incorrect.

It can be argued that the intention of the parties was to create a charge over the proceeds of sale. The objective of the clause was to provide security to the sellers against the possibility of non-payment or insolvency of the buyers. Accordingly, the duty to account for the proceeds and holding the proceeds

[771] R Goode, *Commercial Law in the Next Millennium, op cit* fn 735 at 8-31.
[772] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*, *op cit* fn 739 as per Patten LJ at [68].
[773] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3, as per Roskill LJ at [688].
[774] The Court of Appeal relied upon the flawed logic of tracing claims under the operation of the law under *Re Hallett's Estate* (1883) 13 Ch D 696, however this has argument has been extensively criticised and will not be discussed further. See further, J De Lacy, "Proceed with care" (1989) 10 *Company Lawyer,* 188-191.

for the sellers as fiduciary owners was limited in the following ways. Firstly, to specific time periods when all outstanding debts to the seller had not been paid as illustrated by 'so long as any indebtedness whatever remained outstanding from the defendants to the plaintiffs.'[775] The duty to account and to retain those proceeds exclusively for the seller's account required the buyer to continue this course of action until the entirety of outstanding debts were discharged. Secondly, the duty to account was limited to the amount due to the seller.[776] As such, under this construction the buyer was entitled to the surplus and once payment of the secured debt was discharged, the seller's interest in the proceeds would cease. These elements are indicative of creating a registrable charge. As the created charge was not registered, this would have resulted in the charge being void against the bank holder and had the buyer gone into liquidation, the charge would have been void against the liquidator.

Subsequent retention of title cases have dealt with implying a right to extend title to proceeds of sales by vehemently distinguishing *Romalpa,* with McCormack going so far as saying that the reasoning has 'almost distinguished to death.'[777] This provides sufficient evidence that the conclusion reached in *Romalpa* was completely unsatisfactory. In the event of a retention of title clause explicitly granting the right to claim proceeds arising out of sub-sale to the seller, such clause should be categorised as a registrable charge which will be subsequently struck down as void for lack of registration as per s859A of the Companies Act. The basis behind this rationale is that the courts assume as a matter of business common sense that the contracting parties did in fact intend that the sub-sale is made for the buyer's account, at which point the seller's interest in the proceeds of sale would cease once the payment of debt owed to the seller had been satisfied. As emphasised by De Lacy, it is highly logical to contend that if the buyer is sub-selling the goods of the seller than the buyer should be accountable for any proceeds received.[778] Furthermore, under this line of argument, it was not intended for the buyer to sub-sell in the capacity of the seller's fiduciary agent and as such any profits or proceeds generated from the sub-sale should belong to the buyer, rather than providing a windfall to the seller.[779] Under normal business circumstances, it cannot be reasonably assumed that the parties to a contract agree to provide a windfall to the seller, such logic defies commercial sense on part of the buyer.

[775] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3, as per Roskill LJ at [689].
[776] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 574.
[777] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 182.
[778] J De Lacy, "Romalpa revalued?" (1993) *Conveyancer and Property Lawyer, op cit* fn 752 at 380.
[779] See *Compaq Computer Ltd v Abercorn Group Ltd, op cit* fn 642 as per Mummery J.

Additionally, it cannot be said that the parties intended for the buyer to hold the goods as bailee for the seller. In this case, the Court of Appeal conceded that the buyers were bailees for the aluminium foil as laid out by Roskill LJ:

> 'It seems to me clear…that to give effect to what I regard as the obvious purpose of clause 13 one must imply into the first part of the clause not only the power to sell but also the obligation to account in accordance with the normal fiduciary relationship of principal and agent, bailor and bailee.'[780]

The principles laid out by Roskill LJ meant that because the buyer held the goods of the seller as a bailee, this resulted in the buyer selling the goods as a fiduciary for the seller. Once again taking a literal approach to the clause, the court was willing to imply the obligation expressly contemplated in clause 13 which bestowed an obligation on the buyer to account under the normal fiduciary relationship of principal and agent, bailor and bailee. It was this point, which entitled the sellers to trace and subsequently recover the proceeds of the sub-sale. To this end, rather than the buyer being treated as trading for his own account, it was interpreted as the buyer acting as an agent and a bailee for the goods supplied, with the obligation to account to the seller any proceeds gained when dealing with the seller's goods.[781] In other words, the buyer held the goods as a fiduciary and as a consequence was accountable for any proceeds he received.[782] There has been plenty of authority and academic commentary which refutes this approach.[783] Interestingly, such an approach was questioned by Staughton J in the case of *Hendy Lennox*[784] where he argued that if all agents and bailees were fiduciaries, there was no need to consider whether there was an implied term as to their obligations to sell on the seller's account, as they were bound to account as a fiduciary regardless. As epitomised by Low and Loi, 'a *fortiori*, without an explicit provision giving the supplier the right to those proceeds, a supplier who retains title merely in the original goods will not *ipso facto* despite *Romalpa,* be entitled to assert that the purchaser was selling as fiduciary or agent and will not be able to trace into and claims sub-sale proceeds.'[785] It is highly unlikely that it was the intention of the parties for the buyer to act as a fiduciary agent for the seller.

Clearly, if a relationship of bailment existed between the parties, the question of whether the goods were sold as fiduciary should be ascertained by the construction of the contract. Furthermore, in each

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[780] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3, as per Roskill LJ at [688].
[781] D French, *Mayson, French & Ryan on Company Law, op cit* fn 619 at 316.
[782] J De Lacy, 'Proceed with care' (1989) 10 *Company Lawyer,* 188-191, at 191.
[783] *Compaq Computer Ltd v Abercorn Ltd* [1993] BCLC 602 at [612]; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12 at [498]; *Re Andrabell Ltd*, *op cit* fn 260 at [414].
[784] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd*, *op cit* fn 12 as per Staughton J at [498].
[785] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 236.

individual case, the relationship must be examined to see whether or not the nature of the relationship is fiduciary.[786] Again, it is contended that the above construction is unlikely to reflect what the parties intended, particularly because in *Romalpa* there was no obligation to keep the proceeds of sale separate. If there was a fiduciary relationship between the seller and the buyer, then there would also be an obligation to pay all the proceeds of sale into a separate bank account. Such a course of action would notably impede business efficacy and impact negatively on terms of credit. Usually, the buyer would need the money from the proceeds of sale for their own business, and as such paying money into a separate bank account would unlikely reflect the intention of the parties or the commercial reality of business. In practice, in *Romalpa* the buyer was entitled to benefit and use the proceeds of sale under the buyer's own discretion during the period of credit. This much was accepted by Goff LJ who noted that buyers are not restrained from using the proceeds for their own benefit during the credit period and indicated the difficulties of identifying the nature of the parties relationship:

'No doubt in practice, so long as all went well the plaintiffs would allow the defendants to use the proceeds of sale in their own business, as I understand they did; but things ceased to go well, and now one has to determine the strict rights of the parties…'[787]

As the clause in the present case did not provide for the obligation to keep the proceeds from the sub-sale in an segregated bank account, Baskind et al were doubtful that the relationship involved a bailment and even questioned whether a fiduciary relationship existed on the facts of the case.[788] In line with this reasoning, if the buyers did hold the foil in a fiduciary capacity, this would also have meant that the buyers should have kept the foil completely separate from their own goods. Lastly, this argument would also extend to the above submission of frustrating commercial sense with a buyer allowing a seller to profit from a windfall. As discussed above, based on a fiduciary relationship, the seller would have been entitled to all the proceeds of sale, a sum which might exceed what was originally owed. Again, it cannot be reasonably expected that a buyer would agree to such prospects and would likely be contrary to what the buyer had originally intended. Such an outcome also leads to uneconomic implications and contradicts usual commercial practice.

It has been suggested that one of the instrumental factors which impacted the outcome of the case, was that the buyers conceded that they owed fiduciary obligations to the sellers.[789] This in conjunction with the buyers holding the manufactured goods as bailees, and the sellers being subsequent fiduciary owners of such goods, was also key to understanding the decision reached by the Court of Appeal.

[786] See *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd, op cit* fn 12 as per Staughton J at [498].
[787] *Aluminium Industrie Vaasen B.V v Romalpa Aluminium Ltd, op cit* fn 3, as per Goff LJ at [692].
[788] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 262.
[789] *ibid.*

Although the claim for proceeds of sale did succeed in *Romalpa,* such claims are highly unlikely to succeed in the future as the interest of the seller has been routinely categorised as creating a charge over the proceeds of sale. Claims are unlikely to succeed for a number of different reasons including, firstly; it is doubtful whether a fiduciary relationship or bailment would rise under similar circumstances as we saw with the case of *Romalpa.* Secondly, it is evident that the retention of title clause imposed by the seller on the buyer was incredibly onerous and at times, such concessions defied business logic. Therefore, it is very unlikely that under normal business circumstances that a buyer would agree or intend that any proceeds of sale would be kept solely for the seller, rather than use such proceeds to generate income for the buyer's own business. Additionally, as observed by Baskind et al the decided case poses the question of 'is it really likely that either of the parties would have intended that the seller should receive a sum greater than he was actually owed?'[790] A suggestion which once again flouts commercial sense.

Lastly, as mentioned earlier, there has been a definite trend of judicial reluctance towards the *Romalpa* decision, which also provides conclusive evidence for refuting the proposition that the seller may be entitled to proceeds of sale. Despite the efforts of draftsmen incorporating terms relating to agency, bailment and fiduciary within their contractual provisions to replicate the success of *Romalpa,* the courts in cases such as *Re Andrabell*[791]*, Tatung* and *Re Weldtech Equpment*[792] have been unwilling to establish the obligations as being consistent with that of a fiduciary relationship.

However, in spite of the apparent hostility towards *Romalpa*, it is submitted that the Court of Appeal has set a misguided precedent for how to construe complicated retention of title cases. Some elements such as disregarding the intention of the parties, implying an agency/principal bailee/bailor relationship and allowing implications which reap uncommercial consequences have seeped into more recent cases dealing with difficult retention of title clauses.

5.2 *Wilson v Holt* (Caterpillar)

The second case to be examined is *Wilson v Holt,* whereby the Court of Appeal interpreted a retention of title clause in a sale of goods contract as one that creates an agency relationship between the buyer and the seller. The Court of Appeal relied heavily on an agency construction, in which case the buyer

[790] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 262.
[791] *Re Andrabell Ltd, op cit* fn 260.
[792] *Re Weldtech Equipment Ltd, op cit* fn 652.

was acting as an agent for the seller when sub-selling the goods. Similarly, to what was observed in *Romalpa,* abiding by an agency construction and disregarding the intention of the parties, has once again led to uncertainty in the application of law and produces uncommercial implications, all of which will be examined in the course of this section. Firstly, a summary of the facts of the case will be provided before shedding light on some of the most notable criticisms arising from the Court of Appeal's reasoning and decision in *Wilson v Holt.*

Wilson v Holt concerned the interpretation of an agreement within a contract of sale to sell generators sets and spare parts. The seller had an agreement to sell generators and various spare parts to the buyer, who subsequently sub-sold the generators and parts to its Nigerian subsidiary. The agreement included a retention of title clause, credit payment terms and a clause which specified the following:

> 'buyer shall not apply any set-off to the price of seller's products without prior written agreement by the seller and…title shall not pass to buyer until seller has received payment in full…prior to title passing buyer shall be entitled to resell…and shall account to the seller for the proceeds.'[793]

Following a series of missed invoices of overdue payments whereby the buyer had failed to pay, the seller purported to use the incorporated retention of title clause and exercise his rights under the agreement. The buyer replied stating that the generators and parts had been sold to its Nigerian subsidiary. Therefore, the seller brought proceedings against the buyer for the outstanding price of the goods under the agreement. At first instance, the buyer made a series of arguments however, only two of these arguments were raised to the Court of Appeal. Firstly, the buyer contended that the no set-off clause did not apply to transactional set offs. The judges at first instance and the Court of Appeal gave short shrift to this argument and thus, this matter will not be discussed any further. Secondly, an action on the price under section 49(1) of the Sale of Goods Act 1979 was inapplicable because the retention of title clause prevented section 49 from being operative. The argument of whether property had passed from seller to buyer was contingent on the wording and interpretation of the retention of title clause, which stated:

> 'Title and risk of loss: …Notwithstanding delivery and the passing of risk in the products, title shall not pass until seller has received payment in full for the products and all other goods or services agreed to be sold by seller to buyer for which payment is then due. Until such time as title passes, buyer shall hold the products as seller's fiduciary agent and shall keep them separate from buyer's other goods. Prior to title passing buyer shall be entitled to resell or use

[793] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*, *op cit* fn 739.

the products in the ordinary course of business and shall account to the seller for proceeds of sale…'[794]

The terms and conditions of the contract contained another clause which seemed to contradict the above as it specifically stated that the relationship of the parties would not be deemed to create an agency relationship between the parties. The clause provided 'nothing herein contained shall be deemed to create an agency or fiduciary relationship between the parties hereto.'[795] As such, the contract of sale between the seller and buyer contained two contradictory clauses.

The buyer argued that the seller had no claim under section 49(1) of the Act as the retention of title clause prevented the property from passing to the buyer, as required by section 49. From construing the terms of the above agreement, the buyer argued that the goods had never passed from seller to buyer, rather the effect of the terms meant that the property had passed straight to the sub-buyer (the Nigerian subsidiary) as the buyer sub-sold the goods as the seller's fiduciary agent. Accordingly, an action for price could only be brought under section 49 if the goods had passed to the buyer, for which the buyer argued had not happened in this case due to the buyer acting as an agent for the seller when they re-sold to the sub-buyer.

In response to the arguments concerning section 49, the seller proposed that the property had passed to the buyer because the buyer had authorised the sub-sale to its Nigerian subsidiary on its own behalf.[796] As such, according to the seller, the property first passed to the buyer and then subsequently to the sub-buyer. Accordingly, the seller argued that both contracts were contracts of sale and thus, the seller had a claim under section 49. In addition, the seller also argued that it is possible to bring an action for the price, despite not meeting the criteria set out in section 49.

Interestingly, it is worth noting that the courts displayed a reluctance to rely on previous authorities when seeking to interpret the wording of the retention of title clause. The first instance judge declined to consider the numerous authorities on retention of title clauses for two apparent reasons. Firstly, the authorities in question all consider specific clauses which are framed in different terms and secondly, the courts are naturally concerned with interpreting the case before them and thus, did not want to 'get bogged down'[797] into the comparisons of other construed clauses found in different cases. These sentiments were shared by Patten LJ who thought that many of the retention of title cases

[794] *ibid* as per Longmore LJ at [20].
[795] *ibid*.
[796] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 254.
[797] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd, op cit* fn 739 as per Longmore LJ at [25].

would be of limited assistance as the previous interpretation of cases all turn on specific wording of the contracts.[798] This is of interest, when considering the outcome that was decided significantly departs from previous precedent and has resulted in much uncertainty, as outlined below.

Popplewell J, at first instance, and Longmore LJ of the Court of Appeal, interpreted the clause as not creating an agency relationship on the basis of commercial reality. They argued that the clause was not meant to substitute an entitlement to the goods nor the proceeds of sale via bringing an action for the price, but rather provide security to the seller.[799] The aforementioned judges also relied on the fact that the buyer sub-selling the goods as the seller's agent, did not reflect the intention of the parties as this would mean that the seller would have had a direct relationship with the sub-buyer.

However, the majority of the Court of Appeal decided to follow the agency argument, interpreting the retention of title clause in a sale of goods contract as one that creates an agency relationship between the buyer and the seller. In this instance, the buyer sub-sold the goods as the seller's fiduciary agent. Patten LJ took a literal approach to the interpretation of the terms of the retention of title clause. By construing the literal wording of the agreement, in particular the obligation to account for the entire proceeds of sale, Patten LJ found that this was entirely consistent with the buyer being a fiduciary agent throughout the process of sub-sale.[800] In accordance with this viewpoint, Floyd LJ held that the seller retains property in the goods until paid. However, the buyer had expressly been granted the right to sell the goods before payment and thus, this meant before title passes. As such, Floyd LJ natural reading of the agreement contends that the property never passes to the buyer: 'immediately before and at the moment of the sub-sale the goods remain the property of FG Wilson [seller]'.[801] Prior to title passing, during the period where the buyer is entitled to sell the goods in the ordinary course of business, the goods are held by the buyer as the seller's fiduciary agent. Accordingly, Patten and Floyd LJ held that the buyer did sell as an agent and that the clause alluding to the 'relationship of the parties' did not alter the reached conclusion.

By interpreting a retention of title clause in a sale of goods contract as one creating an agency relationship, the seller could not bring an action for the price due to the fact that the property in the goods never passed to the buyer. Despite the seller acquiring an interest in the proceeds of a sub-sale- a feat only accomplished once before in *Romalpa*, it was for this reason that the sellers were not able

[798] *ibid* as per Patten LJ at [65].
[799] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 567.
[800] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd, op cit* fn 739 as per Patten LJ at [68].
[801] *ibid* as per Floyd LJ at [74].

to bring an action for price. Such an outcome raises some fundamental issues with regards to the utility of retention of title clauses and the exclusive nature of section 49.[802] The following discussion will outline some of the practical consequences arising from construing a retention of title clause as being analogous to creating an agency relationship and not being able to bring an action for price. Once again, such an argument supports the main hypothesis that retention of title clauses are hindered from achieving their functional objectives as such an outcome limits the effectiveness of retention of title clauses in similar situations.

5.2.1 Uncommercial consequences

The construction of the agency argument has been strongly criticised by proponents such as Gullifer, who argues that such a decision leads to uncommercial implications.[803] Previously, the courts have been reluctant to imply terms which give rise to a duty to account, resulting in claims asserting to having an interest in the proceeds of sale being repeatedly rejected by the courts and the interest being characterised as a registrable charge.[804]

Despite the decision of *Wilson v Holt* achieving the much sought-after objective of a seller succeeding in being given a non-registrable interest, the crux of the issue lies with the seller unable to sue for the price. As outlined by Gullifer, this decision leads to uncommercial consequences as it 'raises the more fundamental point that uncertainty over the status of such clauses can only cause market instability and raise costs, either for sellers of the goods or, more likely, for buyers who wish to raise finance against their receivables.'[805] Accordingly, the inability to bring an action for the price under s49 means that sellers will have to raise costs from the onset in order to compensate for the reduced protection afforded by the retention of title clause in not being able to claim for the price of the goods. Clearly, this once again sheds light on the situations where retention of title clauses are not able to offer the expected level of protection to sellers, a situation which is becoming more and more common for the clauses and has been repeatedly highlighted throughout this thesis.

Evidently, the agency construction has an impact on the amount to be paid by the buyer to the seller as it would vary considerably depending on whether it was paid before or after the sub-sale.[806] Under

[802] The author acknowledges that the exclusive nature of section 49 was overruled in *PST Energy 7 Shipping LLC v O W Bunker Malta Ltd* [2016] UKSC 23; [2016] AC 1034 and this is discussed further below at section 5.3.2.
[803] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 251.
[804] See *Tatung (UK) Ltd v Galex Telesure Ltd op cit* fn 644 at [333] and *Compaq Computer Ltd v Abercorn Ltd* [1993] BCLC 602, at [615].
[805] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 565.
[806] *ibid* at 568.

regular circumstances, if the goods were paid before the sub-sale, both parties would agree that the buyer would pay the seller a fixed amount reflecting the full price of the goods. As such, in this regard the seller's losses are mitigated as the fixed amount would guarantee that the seller would receive the full price of the goods. However, regarding the situation post sub-sale, sellers will undoubtedly have to raise the costs to counterbalance the risk of the amount to be paid varying or dropping in price. Sellers would have to raise the costs to protect themselves against the possibility of the goods being sold at a loss in the sub-sale which would lead to adverse consequences such as the sellers not receiving the full price of the goods and incurring a subsequent loss. Although it is appreciated that there is a possibility that the goods may be sold at a profit in the sub-sale and thus guaranteeing the seller some form of windfall, it is submitted that no seller would run the risk of such a variable amount. There is also well-established authority which purports that where a fixed price amount remains payable after a sub-sale, such a recourse would be inconsistent with an agency construction.[807] Accordingly, sellers would want to take precautions to ensure that the full price is received by raising the amount to be paid by the buyer to the seller. Therefore, the inability to claim for the price of the goods has the potential to expose the seller to more risks, and as such the seller would want to compensate adequately to offset such risks. Arguably, such an approach would have detrimental consequences for small and medium sized businesses in terms of financial ramifications of raising costs.[808] Evidently, the need for sellers to take additional precautions to supplement the inclusion of a retention of title clause within the contractual agreement, serves to support the main contention that the present legal position is hindering the clauses from achieving their functional objectives. The incorporation of a retention of title clause on its own, under the present regime is insufficient to grant the sellers the necessary scope of protection needed in such commercial situations. Clearly, there is much uncertainty and unpredictability in the legal position of retention of title clauses being construed as creating an agency relationship.

5.2.2 Unlikely to reflect the intentions of parties

The following section will outline several reasons why it was highly unlikely that the parties intended the buyer to sell the goods as an agent of the seller. Firstly, an apparent consequence of the agency construction is that the contract between seller and the buyer would be predominately overridden by setting out the agency relationship, in which any duties and obligations pertinent to an agent

[807] See *In re Nevill* (1871) LR 6 Ch App 397.
[808] L Gullifer "Retention of title clauses: a question of balance", *op cit* fn 209 at 293.

relationship would have to be outlined.[809] Such discussions necessitate a more coherent and extensively contractual arrangement than the mere inclusion of a single sentence in a clause.[810] As such, it is highly unlikely that the parties intended the clause to draw up the required details of an agency relationship. Another unintended consequence of the agency construction is that the contract of sale between seller and buyer would be categorised as an agency relationship in lieu of a contract of sale as it is evident that under this construction, the contract of sale is between the seller and the sub-buyer.[811]

Additionally, following the agency construction, the seller would have intended to have a contractual relationship with the sub-buyer and consequently the seller would exercise a degree of influence over the contract between the seller and sub-buyer. Conversely, this was not the case in *Wilson v Holt* and as such it cannot be argued that this represented the intention of the parties. Once again, this casts doubts as to whether an agency relationship truly existed. It is worth noting at this stage, that disputing whether an agency relationship existed and the unlikelihood of reflecting the intentions of the parties, mirror the criticisms of *Romalpa*- a troubling coincidence.

Furthermore, it is very difficult to argue that both parties intended that the amount to be paid by the buyer to the seller for the goods would be so variable. Putting aside the agency relationship for a moment, under normal circumstances the amount to be paid by the buyer to the seller before a sub-sale would be a fixed and quoted price. However, adopting the agency construction means that both parties would have effectively intended for the price to be variable, as it would depend on whether the seller was paid before or after the sub-sale, as outlined above. Even more disconcerting is that the fact, that it would be highly unlikely for a buyer to intend the seller to be entitled to a windfall on the sub-sale as it effectively makes the buyer's role in this transaction redundant. This cannot be said to reflect the intention of the parties on the buyer's part and this was relied upon by Longmore LJ: 'It seems to me that the retention of title clause in the present case is intended to operate by way of security rather than to confer a potential windfall on the seller and that must militate against the buyer acting as the seller's agent resale.'[812] It is unlikely that the buyer in this regard would intend to work for nothing and allow the seller to be entitled to profit arising out of the sub-sale.[813] It cannot be

[809] Such obligations would include fiduciary duties such as acting in the best interest of the principal and duties relating to performance e.g. to sell the goods by exercising reasonable care and skill. An exploration of the duties imposed by an agency relationship is beyond the ambit of this thesis.
[810] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 569.
[811] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 251.
[812] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd, op cit* fn 739 as per Longmore LJ at [28].
[813] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 568.

argued that the parties intended an agency as it is apparent that this leads to uncommercial consequences.

Lastly, in construing the retention of title clause of the impugned case, it is highly unlikely that the parties intended for the buyer to act as an agent for the seller. Rather the retention of title clause should have been interpreted as one attempting to enforce security as emphasised by Longmore J.[814] It is much more likely that the parties intended for the seller to be entitled to the proceeds of sale as a means of security, to mitigate the possibility of the buyer failing to pay the full purchase price. This line of reasoning emulates one of the principal reasons for incorporating a retention of title clause within a contract of sale and aligns with commercial sense. As previously discussed in an earlier chapter, the reason behind sellers incorporating a clause which seeks to entitle sellers to the proceeds of sale is to provide them with a proprietary interest in the goods, which will ultimately afford them higher priority than secured creditors in the event of the buyer's insolvency and failure to pay the full purchase price.[815] There is a consistent pattern of retention of title clauses purporting to claim proceeds of sale and thus attempting to confer a potential windfall on sellers, being characterised as registrable charge.[816] Adopting the agency approach, the sellers interest would not be characterised as a registrable charge. This has huge implications most notably, disrupting the previous consistent pattern of proceeds of sale cases, which has come to be considered as an area of law which has since been resolved.[817] The decision in *Wilson v Holt* has clearly introduced implications which flout commercial sense and cause further uncertainty in this complicated area of law.

It is for the above reasons why the agency construction has been heavily criticised. Once again, the agency construction as evidenced in both *Romalpa* and *Wilson v Holt* raises issues which bear unsatisfactory commercial outcomes.

5.2.3 Section 49 Sale of Goods Act 1979

The seller's sought an action for the price under the Sale of Goods Act 1979. For this section to be operative, either it is necessary that the property in the goods has passed to the buyer and subsequently the buyer neglects or refuses to pay for the goods as per s49(1). Alternatively, as per

[814] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd, op cit* fn 739 as per Longmore LJ at [28].
[815] For further discussion on this, see Chapter 2.
[816] See further *Tatung (UK) Ltd v Galex Telesure Ltd*, *op cit* fn 644 at [333], *Pfeiffer Weinkellerie-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd*, *op cit* fn 648 at [160-161].
[817] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 572.

s49(2) the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price. To rely on section 49, one of the above must be satisfied. In *Wilson v Holt,* the sellers did not rely on s49(2) and so the only recourse for an action for the price was to satisfy that property had passed from seller to buyer or to try to sue for the price in circumstances beyond the scope of s49. The Court of Appeal took a stringent approach to s49, by construing that the section outlined the only possible circumstances in which an action for price could be brought. Fortunately, this exclusive approach to s49 has been overruled in the *Bunkers*[818] case but nevertheless warrants discussion to highlight the court's judicial disfavour towards retention of title clauses.

Consequently, the ruling in *Wilson v Holt* meant that no claim for the price of the goods could be brought unless one of the above stipulations of s49 applied. The Court of Appeal observed that if the remedy to bring an action for price was readily available irrespective of when the obligation to pay had arisen, then s49 would largely be superfluous, hence the restrictive approach outlining the only specified circumstances where the remedy is available to sellers.[819]

All judges of the Court of Appeal in *Wilson v Holt* held that section 49 was an exclusive (rather than permissive) remedy which governed the entire circumstances of when a seller can bring an action for the price of the goods. The exclusivity of section 49 meant that sellers who relied on terms purporting to retain title would only be able to bring an action for the price of the goods if the property passed from seller to buyer. Following the Court of Appeal's decision that the buyer was acting merely as the seller's agent in the sub-sale, in this regard property bypassed the buyer's position completely and instead property passed from seller to sub-buyer. Accordingly, property in the goods never passed to the buyer and as such the seller could not bring an action for price under s49.[820] At this point in the discussion, it is interesting to note Longmore LJ's rejection of this agency construction, instead construing the buyer's role as a principal rather than an agent, in which property did indeed pass from seller to buyer, before the sale to the sub-buyer. In this interpretation, the seller would have retained the ability to bring an action for the price, which would have resulted in the seller's interest in the proceeds being categorised as a charge, albeit void for lack of registration. Such a decision would have aligned with previous precedents construing an interest in proceeds of sale as being struck down by the courts for lack of registration. It is this author's submission, that this should have been the correct interpretation of the law, which would have circumvented most of the uncertainties and issued discussed. However, the Court of Appeal adopted the agency construction, which meant that although

[818] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 at [58].
[819] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 257.
[820] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 575.

the goods were in the possession of the buyer, as the seller retained title to the goods until payment, this had the unintended consequence of the seller not being able to rely on the remedy of s49.[821] The s49 remedy is only available where the property in the goods has passed from seller to buyer, which subsequently did not happen in this case.

This decision reached by the Court of Appeal is inherently problematic for the sellers who sought to rely on the inclusion of the retention of title clause for security purposes of achieving the payment of price. As summarised by Low and Loi 'this aspect creates instead a perverse result of inability to sue for the price in spite of the contractual terms agreed between the parties where the clause prevents title from being passed to the buyer.'[822] In *Wilson v Holt,* the Court of Appeal held that property never passed to the buyer, as the buyers were acting as agents for the seller when they re-sold the goods to the sub-buyers. The seller of the goods was not entitled to bring an action for the price of the goods under s49 unless property passed specifically to the buyer. Patten LJ in his judgment opined that property would not pass under the retention of title clause until the payment of the price has been achieved, which subsequently did not happen in the decided case.[823] The agency construction meant that property passed directly from seller to sub-buyer, hence the seller's inability to bring an action for the price of the goods under s49. This leads to a very unsatisfactory conclusion for retention of title claimants and the clauses commercial functionality in the sale of goods market.

The conclusion of the agency construction was ultimately reached despite the inclusion of a different clause which explicitly stated that nothing contained in the contract would create an agency relationship. This services as a cautious warning to those seeking to draft the all-encompassing retention of title clauses, such advances are counterproductive and will be construed by courts as futile. This once again demonstrates the judicial disfavour towards retention of title clauses, whereby the clauses are rendered ineffective by courts on a relatively frequent basis.

An exclusive interpretation of s49 is detrimental for retention of title claimants as for one, it contradicts the provisions included within the contract of sale as agreed by both seller and buyer. Despite contracts expressly providing that an action of the price can be brought when the obligation for a buyer to pay the price has arisen under a retention of title clause, it is clear under this exclusive

[821] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 257.
[822] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 239.
[823] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd, op cit* fn 739 as per Patten LJ at [68].

approach to s49 a seller will be unable to bring an action for the price.[824] Under this interpretation and the decision of *Wilson v Holt*, sellers relying on a retention of title clause will be unable to sue for the price in the circumstances where the goods supplied are with the buyer, despite the contract stipulating otherwise. This severely weakens the utility of the retention of title provision if such terms can be disregarded by virtue of the courts exclusive approach to s49. Ultimately, this has a detrimental impact of rendering the retention of title clause ineffective and impractical within the commercial market. Longmore J recognised this unsatisfactory position but conceded by stating that such a conclusion 'is just an inherent result of a retention of title clause and shows that it has dangers as well as benefits.[825]' By limiting s49 to only two possible situations for bringing an action for the price of the goods, sellers who rely on retention of title clauses are subjected to adverse consequences of being exposed to further risks.

The alleged protection provided under a retention of title clause has obviously been undermined significantly by the exclusivity of section 49. As repeatedly emphasised throughout this thesis, one of the primary purposes of a retention of title clause is that such terms may be relied upon in the event of a buyer's insolvency. In the ordinary course of business, whereby both parties are solvent, the relationship remains as one of seller and buyer. As such, it is entirely reasonable that outside the realm of insolvency, that a seller relying on a retention of title clause would pursue an action for the price of the goods in the event of a non-paying buyer. For practical reasons, retention of title claimants may choose to bring an action against a buyer who has failed to pay a price, rather than going down the route of repossessing the goods. For example, such an action would be entirely appropriate in situations whereby the value of the goods has fluctuated and as a result the goods are worth significantly less than the original price. As retention of title clauses are used as a means of ensuring security, it is perplexing why a seller is being denied the right to bring an action for the price of the goods on account of the stringent approach upheld in *Wilson v Holt.* Such sentiments are shared by academic proponents such as Gullifer who opined that 'it is most unsatisfactory that the seller cannot have the normal choice of a secured party, that is, to sue for the price or to stand on its security.'[826] This unsatisfactory conclusion left the seller without an effective remedy against the buyer, which negates the entire purpose of retention of title clause in seeking to afford the seller a degree of protection. Evidently, the functional objectives of retention of title clauses are invariably hindered by the unfavourable treatment of the clauses by the courts as demonstrated aptly by the court in *Wilson v Holt.*

[824] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 578.
[825] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*, *op cit* fn 739 as per Longmore LJ at [56].
[826] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 578.

5.2.4. An avoidable situation?

Longmore LJ recognised that if a retention of title seller wished to maintain the right to bring an action for the price, the seller could do so by providing that payment was to be due on a day certain, irrespective of delivery, which would then fall under the scope of s49(2).[827] In this regard, s49(2) applies regardless of whether delivery has been made or whether or not title has passed, thus providing the seller an entitlement to bring an action for the price.[828] Sellers should consider the effect of s49(2) by ensuring that the price payable is made on a day certain, irrespective of delivery, in order to guarantee that the seller may maintain an action for the price and consequently, the seller will be afforded some form of protection against a non-paying buyer. A prudent seller could take one step further in this regard by expressly stipulating in the contract that the price is payable, even though property has not passed in order to avoid being caught out by the exclusivity of s49(2).

It appears that s49(2) is effective when the actual date for payment has been expressly stipulated in the contract. According to Gullifer, in situations where the date is only determinable on the occurrence of an act or decision, then such situations are excluded from the remit of s49(2).[829] If this is the correct interpretation, then the provision of '30 days of the date of invoice' stipulated in *Wilson v Holt* would once again result in the sellers being denied a claim for the price of the goods. The rationale behind this is the fact that the 30 days stipulation is dependent upon raising the invoice and concurrently the date of delivery as the invoice could only be raised once delivery has been completed.[830] To overcome such an issue, the seller would have to expressly stipulate a day in the contract, a course of action which is deemed uncommercial on part of the seller and grossly unfair for the buyer's sake, who would normally seek the credit period to extend from the date of delivery.[831] Additionally, it is submitted that by getting sellers to wield their situation within the remit of s49(2), this effectively forces sellers into an inflexible situation and most notably, interferes with the notion of party contractual autonomy. As inferred by Yap 'there could be many commercial reasons why the contracting parties might not want the price to be payable on a day certain, and to effectively insist on this would unduly impinge on the parties' freedom to agree on terms that are the most commercially suitable for them.'[832] While

[827] *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool)* Ltd, *op cit* fn 739 as per Longmore LJ at [44].
[828] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 257.
[829] L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 578.
[830] *ibid.*
[831] See further, L Gullifer "The interpretation of retention of title clauses: some difficulties", *op cit* fn 164 at 578.
[832] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 274.

it is theoretically possible for sellers to attempt to bring an action within the ambit of s49(2), it is proposed that this is too much of an imposition on party autonomy and contractual freedom.

As evidenced above, some of the main criticisms of *Wilson v Holt* include that the decision opposes commercial practice and disregards the intention of the parties, which coincidentally mirrors its predecessor, *Romalpa.* An unwelcoming predicament, which continues to cause inconsistency in the way retention of title clauses are interpreted. Evidently, a disconcerting decision was reached with *Wilson v Holt*, which paved the way for more uncertainty, with the decision of the Supreme Court in the *Bunkers* case, which although did overrule the exclusivity of section 49 alas, created further considerable problems for retention of title clauses.

5.3 The *Bunkers* Case (The Res Cogitans)

The final case which supports the underlying argument that title-retention jurisprudence has evoked significant commercial uncertainty is the *Bunkers* case. The following section will seek to outline how the decision of the Supreme Court in this case has far-reaching implications on legal certainty, predictability and uncommercial ramifications for retention of title cases. Once more, this contention will evidence how retention of title clauses are hindered by the minefield of issues preventing the clauses from achieving their functional objective.

Due to the complicated nature of the facts of this case, it will be prudent to devote attention to both the factual circumstances of the case and the Supreme Court's decision. The facts of this complicated case are as follows, the OW Bunker Ltd (OWB) contracted to supply bunkers of fuel oil to PST Energy, who owned a vessel named *Res Cogitans* (the Owners). There were three main parties to the contract with OWB acting as the middle party in the process of supplying bunkers fuel to vessels in a series of transactions. The three main parties included: the first party OWB, who supplied bunkers through sourcing the fuel externally from physical suppliers, the second group who were the physical suppliers who supplied the bunkers to the vessels and the third party, the Owners who eventually used the bunkers. As such the contract of supply was the last in a chain of contracts involving the fuel bunkers. During the series of transactions, OWB had obtained the bunkers from its parent company, OWBAS, which in turn obtained the bunkers from Rosneft, which obtained the bunker from an associate RMB, which eventually supplied the bunkers directly to the Owners. The contract for the supply of fuel bunkers provided for payment 60 days after delivery and incorporated a retention of title clause,

which stipulated that title to the fuel bunkers would remain until the bunkers had been paid for in full. The contract of supply also expressly provided that from the moment of delivery, the Owners would be entitled to use the fuel bunkers for the purpose of propulsion as the Owners would be 'in possession of the Bunkers solely as Bailee.[833]' This meant that the contract permitted the Owners to consume the fuel during the period of credit. The difficult issue arose once OWBAS became insolvent and subsequently ceased payments with the physical suppliers. This in turn, led the physical suppliers to seek payment from the Owners who used the bunkers during the credit period. Both OWB and RNB sought payment from the Owners. The Owners were concerned that they would have to pay for the same bunkers twice over, and consequently did not pay OWB.

The Owners commenced arbitration proceedings against OWB seeking a declaration that they were not bound to pay for the bunkers or they would seek damages for breach of contract on the basis that OWB had not been able to pass title to them under the application of s2(1) and 49 of the Sale of Goods Act 1979. It is worth acknowledging that RNB another supplier were not part of these arbitration proceedings. The argument to be considered by the arbitrators was whether the Owners were liable to pay OWB, having taken delivery and subsequently consumed the bunkers. The Owners relied on the argument that the title to the bunkers never passed to them, asserting that an action for the price under s49 could not be brought, relying on the exclusive approach to s49 as reached in the decision of *Wilson v Holt.* By contrast, OWB argued that the contract was not a sale of goods contract but rather a contract for the supply of bunkers to be consumed, which meant that payment was duly owed and that s49 would not be applicable.

The arbitrators decided that the Owners were liable to pay, as under the contract OWB did not undertake to transfer title in the bunkers to the Owners. Accordingly, the Owners remained liable to pay. This was agreed by Males J and an appeal by the Owners was dismissed by the Court of Appeal. The proceedings reached the Supreme Court to consider two fundamental questions: firstly was the contract of sale within the meaning of s2(1) of the Sale of Goods Act 1979, and secondly, if so, could OWB bring an action for the price under s49 on the basis that *Wilson v Holt's* exclusive approach to s49 was wrongly decided.

[833] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Clauses H.1 and H.2 at [6].

5.3.1 The decision and reasoning of the Supreme Court

In line with the case's procedural history, the Supreme Court dismissed the appeal and held that the contract was not a contract of sale. The rationale behind the decision was that there can only be a contract of sale if title to the goods successfully transfers from supplier to buyer. Title could not pass under these circumstances as once the bunkers were consumed, the goods ceased to exist. Lord Mance explained that the combination of the retention of title clause, credit period and permission to use the bunkers for propulsion purposes, implied that the parties had an understanding that title would not pass.[834] It was anticipated that the bunkers were likely to be consumed in their entirety before the end of the credit period and as such title to the goods would not pass from the supplier. This reasoning coincides with the definition of a sale of goods contract as provided by s2(1) which states: 'a contract by which the seller transfers of agrees to transfer the property in goods to the buyer for a money consideration, called the price.'[835] In line with this, the court held that the contract was not a contract of sale but rather a *sui generis* contract. Accordingly, s49 did not affect the obligation to pay the price and as such, the Owners were liable for the price under a contract *sui generis*.[836] Furthermore, OWB could not be in breach of contract on the fact that the transfer of title was not the core element of the contract.

5.3.2 Overruling Section 49

The Supreme Court also discussed the position had the decision reached the opposite conclusion of finding that the contract was a sale of goods contract, which would subsequently fall within the scope of the Sale of Goods Act. The Supreme Court held in obiter that s49 would not restrict OWB from claiming an action for the price of the goods.[837] In doing so, it meant that s49 was not exhaustive and thus did not represent the full circumstances in which a claim for the action of price could be brought. In reaching such a conclusion, the Supreme Court held that it would have overruled the decision in *Wilson v Holt,* which advocated for an exclusive approach to s49.[838] Consequently, had the contract been characterised as one of sale, the Supreme Court held that the price would have been recoverable by virtue of an express term of the contract. In other words, s49 does not provide an exclusive list of situations in which an action for the price may be recoverable under a contract of sale. Despite, the

[834] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [26-39].
[835] Section 2(1) Sale of Goods Act 1979.
[836] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [26-39].
[837] *ibid* as per Lord Mance at [60].
[838] *ibid* at [58].

statement being made in obiter, it must be regarded as the current approach to s49 and the availability to bring an action for the price.[839]

Overruling the exclusive scope of s49 can be seen as a welcome development and Lord Mance correctly recognised that the purpose behind s49 was to afford the buyer sufficient protection against being sued before delivery (unless risk has passed).[840] His Lordship also discussed the ambit of section 49 by stating that section 49 does not focus on the circumstance whereby delivery is made but title is reserved until the agreed price has been paid.[841] He continued by noting that the section focused less on the position of a buyer being entitled to dispose of consume the goods or the risk of the goods being destroyed or damaged.[842] As such, his Lordship argued that there is some potential leeway for claims for the price, thus extending beyond the circumstances covered directly by section 49.[843]

This is a positive development as reverting s49 back to a permissive rather than an exclusive remedy, means that s49 remains a valuable remedy for the seller as there may now be circumstances where sellers can claim for the price, even if s49 is not satisfied.[844] One illustrative example is provided by Baskind et al, they state that the price may be recoverable in the circumstances where goods undelivered continue to be the property of the seller but are at the buyer's risk and are destroyed by fire.[845] In doing so this broadens the possible circumstances and means that sellers are no longer restricted by the stringent application of s49. It has been noted that extending the circumstances beyond those provided in s49 reflects modern commercial reality, as occasions may arise where it will be deemed fairer if the price can be claimed at the time of delivery to the buyer, even if the title to the goods has not passed.[846] Accordingly, this overcomes the issue of s49 excluding situations where arguably sellers should be able to bring an action for the price of the goods such as where the goods have been consumed lawfully as observed in the *Bunkers* case. Incidentally, this also addresses the earlier issue of imposing sellers to bring their situation within the ambit of s49(2), in which parties are forced to make the price payable on a day certain. By opening the circumstances beyond those included in s49, it can be argued that this will benefit the position of sellers as such a prospect allows for more contractual freedom compared to the incursion on their party autonomy by virtue of s49(2).

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[839] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 9.
[840] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [49].
[841] *ibid.*
[842] *ibid* at [50]
[843] *ibid* as per Lord Mance at [53] in which he states '*But I consider that this leaves at least some room for claims for the price in other circumstances than those covered by section 49*.'
[844] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 273.
[845] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 259.
[846] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 274.

Parties will no longer have to insist on making the price payable on a day certain on terms which are deemed inflexible and overly burdensome on the contractual parties. Such a decision has expanded the scope of the availability of the remedy and consequently promotes the notion of freedom of contract as parties are now afforded further freedom to negotiate their own preconditions.[847]

Despite the welcome development of overruling s49 in obiter, it is important to note that the Supreme Court appears to have taking a tentative approach to this area of law. First of all, Lord Mance declined to specify the precise circumstances in which the price may be recoverable outside the remit of s49 by stating:

'The precise limits of such circumstances- and the significance which may in particular attach to the use of retention of title clauses in combination with physical delivery of the goods and the transfer of risk- must be left for determination on some future occasion.'[848]

It can be argued that this is a missed opportunity for the Supreme Court to clarify the precise circumstances which may be recoverable outside the scope of s49. Leaving this as an open-ended resolution merely adds to the excessive ambiguity of this area of law. To exacerbate this further, the Supreme Court failed to provide any justifiable reasons for reaching this unsatisfactory and open-ended decision – a frustrating predicament. Sellers are left with limited indication of the circumstances where an action for the price of the goods can be brought.[849] Although it is acknowledged that the Supreme Court used the case of *Harry & Garry v Jariwalla*[850] to provide some form of guidance, under the circumstances it is still unclear as to when an action for the price can be brought beyond the situations provided in s49. From the decision of the Supreme Court, it is suggested that bringing an action outside of the scope of s49 will only be applicable to cases such as *Harry & Garry v Jariwalla,* the situation raised in *Bunkers* (had the contract been characterised as one of sale) and finally, where risk has passed but the title has not passed.[851] The Supreme Court held that it was possible for the price to be claimed outside the scope of s49 due to the fundamental factor of risk passing under the contract, despite the title to the goods not passing.[852] Guidance on the precise circumstances where an action can be brought outside s49 has been rather limited, and merely speculative in nature. Additionally, the decision reached in *Bunkers* does not provide sufficient guidance to ascertain

[847] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 11.
[848] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [57].
[849] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 275.
[850] *Harry & Garry Ltd v Jariwalla* [1988] WL 1608652. This case involved a buy-back contract which was categorised as a *sui generis* contract. Had the contract been characterised as one of sale, by virtue of the party's agreements to vary the terms of the Sale of Goods Act, it would have been possible for the price of the goods to have been recovered.
[851] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 9.
[852] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [57].

whether parties are able to incorporate any conditions for the seller's right to claim the price, this remains unclear and has yet to be substantiated. It is unfortunate that the court with the highest authority declined to give further detail on the circumstances where the price can be claimed outside s49 as this would arguably provide some much-needed clarity for this complicated area of law. It is uncertain as to whether there will be another salient opportunity for the Supreme Court to provide clarification on this precise issue.

Secondly, despite stating that *Wilson v Holt's* restrictive approach would have been overruled had the contract been categorised as one of sale, the Supreme Court also commented that the courts should exercise caution when recognising claims extending beyond the instances listed in s49.[853] This indicates a form of reluctance by the judiciary and it is anticipated that the ambit of circumstances that will allow parties to bring an action for the price will be much more limited in practice. A predicament that will not be tested until a similar case requires the courts' consideration. It is not known how long we must wait for further clarification from the court to test this hypothesis thoroughly. Once again, the progression of this area of law is subject to the incremental and fragmented development of case law. The legal position of retention of title clauses is still subject to considerable uncertainty and unpredictability in the wake of the *Bunkers* litigation.

Finally, it is submitted that the law in relation to s49 remains unsatisfactory, despite the alleged improvements outlined above. By expanding the circumstances where it is possible for a claim to be brought, it has the effect of undermining the significance of s49 for retention of title claimants. The rationale behind s49 was always to protect a buyer from paying the price of the goods before delivery. The Supreme Court may have reduced the availability of s49 for sales contracts incorporating a retention of title clause. In contracts involving a retention of title clause, it is a well-known concept that risk normally passes with delivery, whilst the title pass once payment is made. Accordingly, the scope of s49(1) may now be confined to cases which do not involve retention of title clauses or credit terms, in the instances where title to the goods passes before or upon delivery.[854] As noted by Saidov, 'given a wide use of retention of title clauses [ROTC] the exceptions introduced by RC *[Bunkers]* would completely swallow up the rule in s49, to a considerable degree de factor restructuring the price action with reference to delivery.'[855] The resulting uncertainty of this area of law is regrettable as it detrimentally impacts the utility of the s49 remedy, despite the remedy's past significance for

[853] *ibid* as per Lord Mance at [53]. See also, E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 259 for a similar argument.
[854] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 11.
[855] *ibid* at 12.

contracts including retention of title clauses in volatile markets. The functionality of retention of title clause has clearly been hindered by the Supreme Courts' approach to s49 in *Bunkers*.

5.3.3 Characterisation of contracts as *sui generis* contracts

Once again, the decision reached in *Bunkers* of characterising the contract as a *sui generis* contract rather than a contract of sale was reached by the courts by taking a very literal approach to the interpretation of the retention of title clause. Without the inclusion of the specific wording of the retention of title clause, the contract would have been characterised as a contract of sale. In *Bunkers,* the Supreme Court believed the contract in hand could not be characterised as one of sale because the contract entitled the Owners to use the bunkers, despite not acquiring title to the goods. Clearly, the issue lies with the transfer of title whereby the Supreme Court insisted that it was not possible for title in the goods to transfer in circumstances where the goods have been consumed and thus, cease to exist.[856] Accordingly, the Supreme Court took the view that the contract could not be one of sale as this was inconsistent with the retention of title clause as the goods would be consumed before the end of the credit period. Rather the contract was categorised as a *sui generis* contract with two elements: firstly, there was an agreement which permitted the consumption of the bunkers before payment and without the passing of title, and secondly, an agreement to transfer title to any remaining bunkers once the Owners had satisfied the purchase price of all bunkers, irrespective of whether such bunkers had been consumed or not. Under this construction, the permission to use the bunkers for propulsion purposes prior to payment, was by way of licence. Following the pattern of the preceding cases of *Wilson v Holt* and *Romalpa,* the court in *Bunkers* chose to construe and interpret the clause in isolation, rather than taking a holistic approach to the case and thus failed to consider the wider implications arising out of such a decision. The intention of this section is to demonstrate why such an interpretation can lead to further uncertainty and uncommercial ramifications for the functionality of retention of title clauses.

It has been noted that the decision of categorising the contract as *sui generis* by the Supreme Court has produced significant uncertainty for this area of law. Firstly, Gullifer states that characterising the contract as *sui generis* produces uncertainty as it 'draws an unwelcome distinction, on one hand, between the characterisation of contracts for the supply of bunkers where no credit is provided (or where credit is provided but there is no ROT clause) and contracts where credit is provided and a ROT

[856] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [28].

clause is included.'[857] This decision clearly undermines the overall value of retention of title clauses and the characterisation as *sui generis* contracts may act as a deterrence for parties who will undeniably seek contractual security by using alternative formats such as letters of credits or demanding guarantees.[858] Clearly, the alleged protection afforded by retention of title clauses has been completely undermined by the distinction as not a contract for sale. This may lead sellers to consider whether it is beneficial for them to include a retention of title clause within their supply contract, as without the clause, the contract in *Bunkers* would have satisfied the requirements of section 2(1) of the Sale of Goods Act as a contract of sale.[859] Additionally, if retaining security prior to payment is fundamental to potential suppliers, suppliers may wish to avoid including a retention of title altogether, preferring other methods of securing payment such as payment by letter of credit which following the aftermath of Bunkers provides greater security for sellers against the risk of insolvency.[860] The crux of the issue lies with the problematic rationale of holding that the contract cannot be categorised as a contract of sale, because the contract provided that the Owners could consume the bunkers before payment and as such, title to the goods could not pass as the goods ceased to exist. This contradicts with one of the fundamental functional characteristics of a retention of title clause. One of the principal objectives and benefits of retention of title clauses is allowing for the extension of credit periods to encourage greater sales, whilst simultaneously guaranteeing the seller a form of quasi-security to the goods supplied.[861] From the perspective of the buyers, the credit terms would not be commercially viable if such buyers were restricted from using the goods in the ordinary course of business during the credit period. For such reasons, the possibility of the goods being used or consumed in the course of business during the credit period is always readily available. The Supreme Court's interpretation is thus perplexing as it seems to contradict the purpose of credit. As noted by Loi et al, 'after all, what would be the point of credit if the goods so obtained could not be used in any fashion prior to payment?'[862] It might be suggested that the ramifications of *Bunkers* will only impact on a relatively small pool of cases, most notably any contractual agreements in the bunkers market which contain both a retention of title and a provision for the consumption of the goods, however this is simply not true. The implications of *Bunkers* will be felt across a wide range of industries, as such it cannot be said that the decision will only impact cases relating to fuel bunkers.

[857] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 257.
[858] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 4.
[859] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [58].
[860] B Ellison, L Williams and S Fellows "Commodities contracts and the impact of the OW Bunkers case" (2016) available at https://www.reedsmith.com/en/perspectives/2016/06/commodities-contracts-and-the-impact-of-the-ow-bun%20 Accessed 03/07/2020.
[861] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 247.
[862] *ibid.*

The decision on this scale has over-arching ramifications of affecting a wide range of industries where consumables are supplied on credit terms with retention of title clauses pending payment. Markets which include food, pharmaceuticals and chemicals are just some of the most obvious examples which will bear the heavy burden of the decision in *Bunkers.*[863] Undoubtedly, this raises issues in relation to the utility and overall functionality of the retention of title clause where once again the protection afforded by such clauses is questioned and reduced considerably by the decision in *Bunkers.*

The uncertainty deriving from the characterisation of a *sui generis* contract rather than a contract of sale undermines the protection afforded by retention of title clauses and more broadly, falls outside the benefit of the Sale of Goods Act. It can be argued that categorising a contract purporting to supplying goods as not one of sale, but of *sui generis,* widens the category of applicable contracts too broadly.[864] The incorporation of retention of title clauses in contracts for the sale of raw materials and stock in trade is widely prevalent in the market, as is terms relating to consumable goods.[865] In most circumstances, the intention is that raw material goods will lose their identity in the manufacturing process, such a course of action is likely to happen before the end of the credit period. It is also possible for such materials to be have been consumed, perished, destroyed by a variety of different means.[866] With regards to contracts for sale of stock in trade, the norm is that the goods will be sold before the end of the credit period. As such, in most transactions of sale concerning consumable or raw materials, the period of credit will be longer than the ability of the buyer to keep such goods in a preserved condition. In addition, the *Bunkers* decision will undoubtedly cause confusion and uncertainty in relation to 'current-account' retention of title clauses, where a buyer will not be granted ownership until all monies or liabilities owed to the seller have been paid.[867] When considering current-account clauses, it is highly likely that the original goods would have dissipated in some form before the property in the goods intends to pass. The common thread for all the examples provided is that once such actions have taken place, it will no longer be possible for title in the goods to pass to the buyer. By applying the reasoning found in *Bunkers,* is it correct to assume that none of the above examples are now contracts of sale? If so, this would limit the scope and threshold of the Sale of Goods Act considerably as a significant proportion of retention of title cases would no longer fall within the ambit

[863] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 277.
[864] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 259.
[865] See A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?" (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly,* 24-28, at 26.
[866] See section 1.3.4 and section 4.4.4 for a comprehensive discussion on perishable/ consumable goods.
[867] See *Armour v Thyssen, op cit* fn 629 for a useful example of a current-account retention of title clause where the clause provided '*all goods delivered by us remain our property (goods remaining in our ownership) until all debts owed to us including any balances existing at relevant times- due to us on any legal grounds- are settled*.'

of the Sale of Goods Act. In falling out of the scope of the Sale of Goods Act, such supply contracts would not be a contract for the sale of goods, but a *sui generis* contract which would include a licence permitting the activity (which makes it impossible for title to pass) at the time of payment.[868] This has widespread significance for retention of title clauses as such contracts may no longer be interpreted as one for the sale of goods. A dilemma which would render the Sale of Goods Act considerably obsolete.[869] This issue was identified by Saidov who states that 'from a well-developed area of the law that lay at the heart of commercial law, sales law is suddenly in danger of being seriously marginalised, with its functions ceded to the newly created *sui generis* contracts, the law on which is completely underdeveloped.'[870] Clearly, the decision reached in *Bunkers* has diminished the importance of the Sale of Goods Act and sales law in general, by substantially reducing the applicable transactions within its remit. Additionally, falling outside the Sale of Goods Act has detrimental implications for both suppliers and buyers as the statutory protection will cease to apply to such supply contracts. From the perspective of the buyer, they will no longer be able to rely on section 14 which denotes that the goods supplied are of 'satisfactory quality'[871] nor the protection afforded by section 14(3) which provides that the goods purchased will be 'reasonably fit for purpose.'[872] The materiality of such implications may not be as significant since the Supreme Court suggested that terms relating to description and quality could be implied into the *sui generis* contracts and that such terms would be closely analogous to a sale.[873] However, such a contention evokes immediate questions relating to how such terms will be implied if not by the Sale of Goods Act? Furthermore, as *Bunkers* was decided by the Supreme Court, a case of the highest authority, evidently the decision will be relied upon in future cases dealing with the interpretation of retention of title clause and the surge of characterising contracts as *sui generis* contracts. The market stability afforded by the accumulation of previous title-retention decisions has clearly been disturbed by the decision of the Supreme Court. The reasonable degree of certainty experienced by the judiciary, practitioners, and contracting parties in relation to the interpretation of retention of title clause has been sacrificed to greater uncertainty on an ever-reaching scale. Furthermore, although the Supreme Court acknowledged that the *sui generis* contract would 'contain similar implied terms as to description, quality, etc to those implied in any conventional sale,'[874] it will take considerable time for definitive answers to emerge and as such, we are once again

[868] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?" *op cit* fn 60 at 260.
[869] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 276.
[870] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 5.
[871] Section 14 of the Sale of Goods Act 1979.
[872] Section 14(3) of the Sale of Goods Act 1979.
[873] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [31].
[874] *ibid.*

left at an unsatisfactory state of law, the legal position of retention of title clauses is riddled with uncertainty.

Moreover, if a large range of contracts will cease to be interpreted as contracts of sale, this raises a few practical issues with categorisation. Notably, it will be difficult to ascertain which terms are to be implied into contracts or to what extent will contracts be categorised as contracts for the sale or supply of goods. In the circumstances where contracts do not contain a retention of title clause, these should generally be construed as contracts of sale, even where there is a right to consume prior to payment on the basis that title to the goods often passes on delivery and thus before consumption.[875] However, *Bunkers* has unwittingly complicated matters to the point of not being able to tell if sales on credit involving retention of title clauses will fall under the remit of the Sale of Goods Act or not. It is no longer clear whether a category will be categorised as a contract of sale or *sui generis* as such a characterisation will entirely depend on the specific facts of the case and the subject matter of the goods, an outcome which produces significant uncertainty and cannot ensure predictability within the commercial market. Additionally, the characterisation of the supply contracts as *sui generis* may necessitate parties revising contracts to ensure that the terms fall within the ambit of the Sale of Goods Act. This may require parties to incorporate provisions which mirror the provisions of sale or supply of goods to ensure that their contract will be governed by their preferred characterisation.[876] Any revision or amendment of contracts will increase transactions costs for the involved parties.

The decision of holding that the contract was not one of sale, seems to defy the intention of the parties. From the onset, it was clear that the parties themselves constructed the contractual agreement as one of sale, with the inclusion of express permission to consume the bunkers in the propulsion, before payment. This was alluded to at first instance by Males J:

'I accept that the parties' contract is drafted as a contract of sale and contains numerous terms appropriate to such a contract. It is therefore a reasonable starting point that this is what the parties intended and is indeed the true nature of the contract which they have concluded.'[877]

There are numerous indications which support this submission including the fact that the contract itself was described as a contract of sale and the contract identified the parties as 'seller' and buyer'.[878] The contract also contained terms which used the language of sale and additionally the contract used

[875] See *Wood v TUI Travel Plc* [2017] EWCA Civ 11, [2018] 2 W.L.R 1051 as per Lord Justice Burnett at [25].
[876] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 4.
[877] *PST Energy 7 Shipping LLC, Product Shipping and Trading S.A v O.W. Bunker Malta Limited, ING Bank N.V* [2015] EWHC 2022 (Comm) as per Males J at [28].
[878] *ibid* as per Males J at [11]. The contract between OWB and the owners was titled 'Terms and Conditions of sale.'

similar terms as expected from a contract of sale.[879] Accordingly, the contractual parties clearly contemplated that the contract for which they provided was to be construed as a contract of sale. Defying the intention of the parties and subsequently construing the contract as something different to what was reasonable expected to be the parties' intention is a common denominator of all three cases discussed: *Romalpa, Wilson v Holt* and *Bunkers.*

The decision in *Bunkers* seems to not only go against the intention of the parties but also extends to thwarting the bunkers industry as well. Past cases which have dealt with the supply of bunker fuel have commonly proceeded on the basis that the contracts in question operate as contracts of sale.[880] Contracts for the supply of bunkers use similar contractual language to that observed in *Bunkers,* which indicates a common understanding with the market that bunkers supply contracts operate as contracts of sale.[881] Construing the contract as anything other than contracts of sale has undoubtedly changed the understanding and expectations within the bunkers industry. It has been observed that the decision in *Bunkers* has practical implications for the bunkers market as it is uncertain as to whether shipowners would agree to pay the set amount for bunkers with the caveat of only granting a mere licence to use the bunkers.[882]

The last argument to be put forward with regards to the characterisation of the contract as *sui generis,* concerns the Supreme Court's emphasis on the term allowing consumption. It is respectfully submitted that the reliance of the Supreme Court on the express provision allowing for the consumption before payment as being instrumental in the characterisation of the contract as *sui generis* and not a contract of sale is inherently incorrect. Three different arguments will be used to support this submission.

Firstly, it has been noted that the nature of the contract and whether it falls within the remit of the Sale of Goods Act should be determined at the date of contract formation, rather than be construed by events which occur at a later date such as the consumption of goods.[883] The nature of the contract should be determined at the date of contracting as this allows parties to have sufficient notice to

[879] *ibid* as per Males J at [27].
[880] See *The Saetta* [1994] 1 WLR 1334 and *The Fesco Angara* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep 61. Both cases provide support that a contract for the supply of bunkers (with a retention of title clause) is a contract of sale. Although it is acknowledged that this issue was not directly decided in the cases.
[881] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 4. It is acknowledged that the intention of the parties and labels used in the contract are not exclusive indicators for dictating whether the contract is one of sale, but merely helps with the interpretation for the purpose of s2(1) of the Sale of Goods Act 1979.
[882] *ibid.*
[883] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 278.

prepare for whether the terms of the Sale of Goods Act apply to their set of circumstances. If they do not, parties are left with adequate time to plan any necessary actions during the duration of the contract which may offset any unforeseen risks. From a commerce perspective, parties need to know at the time of contracting whether their contractual agreement will be categorised as a contract of sale rather than at the time that their issue is being heard at court.[884]

Secondly, the decision in *Bunkers* contradicts earlier retention of title cases which have assumed that the contracts in question have been interpreted as contracts of sale. The Supreme Court referred to earlier authorities such as *Borden*[885], *Forsythe*[886], *Angara*[887] and *Armour v Thyssen*[888] but commented that it was merely assumed that such transactions were contracts of sale and accordingly, within the scope of the Sale of Goods Act.[889] Accordingly there is a direct contradiction between the implicit assumption in earlier cases that the contracts in question were contracts of sale and the express decision in *Bunkers* that the contract could not be construed as one for the sale of goods.[890] By characterising the *Bunkers* contract as *sui generis*, the Supreme Court was able to bypass the earlier retention of title authorities without adequate justification for doing so. It remains unclear as to why the contract in *Bunkers* was fundamentally different from any other retention of title cases which allowed for the use of the goods. Lord Mance merely stated that the above cases were not authoritative as firstly, it was assumed that the transactions were agreements of sale and secondly, that the issue under question of categorising a supply contract for bunkers with a retention of title clause which permitted the consumption of the bunkers before payment, had not been addressed.[891] It is respectfully submitted that this did not provide justification for bypassing the earlier authorities, as it is highly improbable that earlier authorities would address such specific issues. This point was emphasised by Bridge who argues 'moreover, the courts took in their very comfortable stride the fact that previously, in numerous reservation of title cases at first instance, in the Court of Appeal and in the House of Lords, contacts that would now be treated as *sui generis* contracts were treated as sale of goods contracts. The issue had not arisen in those cases, so they were simply put on one side.'[892] Bypassing the existing authority without sufficient justification merely adds to the incoherent way

[884] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 279.
[885] *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48.
[886] *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1994] 1 WLR 1334.
[887] *Angara Maritime Ltd v Oceanconnect UK Ltd* [2010] EWHC 619 (QB), [2011] 1 Lloyd's Rep 61.
[888] *Armour v Thyssen Edelstahlwerke AG, op cit* fn 629.
[889] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [35].
[890] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 279.
[891] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [35].
[892] M Bridge "The UK Supreme Court decision in The Res Cogitans and the cardinal role of property in sales law" (2017) *Singapore Journal of Legal Studies,* 345-365, at 364.

these cases have been dealt with by the courts and once again contributes to the overall uncertainty. Evidently, retention of title clauses have been perfunctorily treated by the courts which demonstrates that the clauses are hindered by both judicial disfavour and significant legal uncertainty.

Thirdly, it is submitted that the decision reached in *Bunkers* limits the overall functionality of retention of title clauses and has a detrimental impact on the ability of sellers to claim for the price of the goods. This criticism emanates from both the approach to s49 and the interpretation of the contract as *sui* generis and not one for sale. The crux of this argument focuses on the fact that *Bunkers* eludes the possibility that title to the goods can pass either at the precise time of consumption or momentarily before the extinction of the goods. Accordingly, in the event of the goods being consumed or used in a manufacturing process which results in the extinction of the goods, normally title passes either at the moment of destruction or immediately before the demise of the goods.[893] As the goods no longer exist, it is impossible to retrieve the goods and thus, the seller is left with an unsecured claim for the price. This has been the position for previous retention of title clauses cases.[894] This interpretation would also be applicable for *Bunkers* in dealing with a chain of contracts, in which there would be an implied term providing that title to the goods passes when the bunkers are used. Thus, this analysis would allow the seller to rely on s49(1) to bring an action for the price of the goods. This interpretation of an implied term was rejected at first instance by Males J who argued that this would contradict the express provision that title to the goods would pass on payment[895], this view was also observed by the Supreme Court.[896] However, rejecting this interpretation has arguably limited the circumstances whereby retention of title clauses can operate when provisions are included which allow for the consumption of the goods. The justification for being inconsistent with the retention of title clause as the goods would be destroyed before the end of the credit period, arguably renders retention of title clauses infinitely less functional. If the bunkers have been consumed before the end of the credit period, title intrinsically cannot be retained, which means that the retention of title clause is made effectively useless and without application. Under these circumstances, the only applicable situation whereby the retention of title clauses will be functional is if there are remaining bunkers at the end of the credit period and if the price is still not paid in full. This significantly reduces the circumstances where retention of title clause can be operational, and the clause will only afford protection where there are bunkers remaining at the end of the credit period. The characterisation of the contract as

[893] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 260.
[894] See *Armour v Thyssen Edelstahlwerke AG*, *op cit* fn 629; *Borden (UK) Ltd v Scottish Timber Products, op cit* fn 48.
[895] *PST Energy 7 Shipping LLC, Product Shipping and Trading S.A v O.W. Bunker Malta Limited, ING Bank N.V, op cit* fn 847 as per Males J at [67].
[896] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [28].

not one of sale in *Bunkers* has undoubtedly caused a significant degree of legal uncertainty and has once again led to uncommercial and impractical ramifications. As epitomised by Low and Loi, 'English law appears to be stuck in Wonderland until such time as another dispute involving another mock sale comes before the Supreme Court, after which, perhaps, it can go back to being a real sale again- respectable and commercial sensible.'[897] Possible suggestions on how to resolve the many uncertainties occasioned by *Bunkers,* are discussed in the conclusion of the thesis.

5.4 Conclusion

As discussed, it can be argued that *Romalpa* set the foundation for the unfortunate way in which retention of title clauses have been interpreted. Since the decision in *Romalpa* has neither been reversed or overruled, its repercussions continue to plague this area of law. There is a notable paradigm of subsequent case law undermining the effectiveness and overall functional utility of retention of title clauses in some way shape or form. From a judicial standpoint, this area of law will continue to be beset by uncertainty. Retention of title claimants and contractual draftsmen persistently seek to mimic the illusory perception of the 'perfect' retention of title clause as set out by *Romalpa* and *Wilson v Holt.* It is apparent that commercial parties are consistently tempting fate by using ineffectual but more elaborate clauses, which subsequently test judicial reasoning. The courts will be consistently challenged by the ingenuity of parties who will '[persist] in using likely ineffectual clauses in the face of hostility rather than adopting tried and tested clauses.'[898] This norm will continue until *Romalpa* is finally laid to rest.

Despite the inherent judicial reluctance to *Romalpa*, the courts tend to respectfully distinguish the case rather than explicitly oppose and criticise its reasoning. In doing so, draftsmen are under the illusion that the perfect retention of title clause is still within their grasp and that such an objective is achievable. Draftsmen continue to be flaunted with the possibility of the all-encompassing retention of title clause and are not put off by the judicial hostility and thus continue to push their luck, a feat which is rendered plausible by the court's inconsistent approach to interpreting retention of title clauses. This has led to iterative failures in case law reasoning which has produced uneconomic and impractical outcomes. The Court of Appeal's decision in *Wilson v Holt* is unsatisfactory and once again creates uncommercial implications and raises the possibility that contracts of sale may be interpreted

[897] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 253.
[898] *ibid* at 238.

as contracts of agency, resulting in a large degree of uncertainty. Even worse is the Supreme Court's characterisation of contracts of supply as *sui generis* contracts in *Bunkers*, a characterisation which detrimentally hinders the overall functionality of retention of title clauses and potentially renders such cases outside the scope of the Sale of Goods Act. The decision in *Bunkers* has produced great uncertainty and has profoundly impacted the law on sales, ultimately disrupting the prior understanding that transactions involving retention of title clauses and provisions permitting for the consumption of the goods, are in fact contracts of sale. It is evident that the efficacy of retention of title clauses continues to be undermined and threatened by the courts inability to deal with these difficult cases in a comprehensive and holistic manner. As perfectly encapsulated by Gullifer 'hard cases make bad law[899]'- a sentiment that hits the nail on the head. Evidently, the outlook for future retention of title clauses is oppressively bleak and the scope of the clauses' application has been reduced considerably by the cases outlined in this chapter.

The legal position in relation to retention of title clauses is confusing, contradictory, and unsatisfactory. The unsatisfactory treatment of the clauses can also be evidenced during insolvency proceedings which will be discussed at length in the next chapter. The discussions of this chapter sought to illustrate the difficulties encountered for those parties seeking to rely on retention of title, difficulties which are exacerbated by weak rationalisation of legal rules and inconsistent interpretation of the clauses by the courts. Undoubtedly, legal uncertainty is an intrinsic factor for explaining why the clauses are not providing the expected level of protection. This integral theme will continue to be explored in the subsequent chapter.

[899] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 244.

CHAPTER 6: COMPANY IN ADMINISTRATION

6. Introduction

One of the main limitations on the effectiveness of retention of title clauses is the statutory moratorium during the process of administration. As a disguised form of security interest, retention of title claimants are met with great uncertainty and difficulty in the context of goods of an insolvent company.[900] Thus, the statutory moratorium causes significant hindrances for those seeking to successfully rely on their retention of title clauses. The recurring theme of the increasing situations where retention of title clauses will not be effective in offering the expected level of protection, is once again apparent in the field of insolvency law. The functional objectives of retention of title clauses are significantly weakened in this context by the combined impact of insolvency law provisions and the need to obtain the consent of the court to proceed with title retention claims once a company has entered administration proceedings. The effectiveness of retention of title clauses are severely impeded by some of the practical repercussions of the statutory moratorium, all of which will be explored throughout the course of this chapter.

Immediate consequences will result following a company entering administration, most notably initiating rescue attempts to salvage the company. Accordingly, the purpose of administration is to provide the opportunity for distressed companies to initiate rehabilitation proceedings, with the purpose of attempting to rescue the company as a going concern as specified in paragraph 3, Schedule B1 of the Insolvency Act 1986.[901] By making an administration application or alternatively filing a notice of intention to appoint under Schedule B1 of the Act, this imposes a moratorium on taking steps against the company and consequentially the company's property.[902] Accordingly, during this period of administration, it is evident that certain parties are significantly impeded by the statutory moratorium as they are unable to take any immediate course of action. Most notably, the parties who are directly affected by the statutory moratorium are those parties seeking to exercise their proprietary or contractual rights.[903] Under this remit, retention of title holders fall under the category

[900] D Milman "Security Interests and quasi-security claims in UK corporate insolvency law: current issues" (2011) *Company Law Newsletter* 299, 1-4, at 1.
[901] Paragraph 3, Schedule B1, Insolvency Act 1986.
[902] W Trower, D Allison, A Goodison and A Shaw, *Corporate Administrations and Rescue Procedures,* 3rd Ed, London: Bloomsbury Publishing, 2017, at 31.
[903] D Milman "Moratoria on enforcement rights: revisiting corporate rescue" (2004) *Conveyancer and Property Lawyer,* 89-108, at 89.

of those negatively impacted by the statutory moratorium. The specific ways in which the moratorium impedes retention of title holders will thus be critically discussed in the course of this chapter.

There are essentially, two types of moratorium in administration, the statutory moratorium and the interim moratorium, which both have similar effects and implications. Pursuant to paragraph 43, Schedule B1 of the Insolvency Act 1986, no steps can be taken to enforce security of the company's property without the consent of the administrator or permission of the court. Accordingly, any enforcement of security or legal proceedings against the company in administration are suspended, which means that goods under a hire purchase agreement, leasing or a retention of title clause agreement may not be immediately repossessed during the moratorium.

In order to repossess goods which have been supplied with an incorporated retention of title clause, parties must seek leave to lift the moratorium by ascertaining the consent or permission of the administrator or court. Under paragraph 44 of the same schedule, this period of prohibition is also relevant during interim moratorium in an administration. Paragraph 44(2)(a) states that this period applies from when a copy of notice of intention to appoint an administrator is filed, until the appointment of the administrator takes effect. The interim moratorium protects a company and its assets between the start of the process of administration up until the start of the administration itself. Essentially, both the statutory and interim moratorium under Schedule B1 prevents and suspends creditors and third parties from taking action against an insolvent company in administration during a set period of time.

Consequently, the following chapter will critically analyse the statutory moratorium with particularly focus on how the moratorium negatively impacts the effectiveness of retention of title clauses. Arguably, recent judicial decisions have compromised the claimant's ability to use retention of title clauses effectively by exposing claimants to delays, disruptions and setbacks. Additionally, this chapter will illustrate how the statutory moratorium imposes significant limitations on the enforcement of security, proprietary and contractual rights. This discussion provides another example of how the current law impedes the overall effectiveness of retention of title clauses in the context of a company in administration.

6.1 The statutory moratorium in administration

6.1.1 Scope of the moratorium

The purpose behind the moratorium in administration can be broadly encompassed under two rationales: rehabilitation and protection against creditor action. Firstly, one can argue that the purpose of the statutory moratorium is to provide insolvent companies with a period of time, during which the insolvency process attempts to rescue the business. The whole purpose of administration procedures is to provide companies in financial difficulty the possibility of rehabilitation. Companies can be reorganised with the intent of promoting the rescue/ rehabilitation of the company. During the moratorium period, the company or its administrators are granted time to consider the possibility of rehabilitation by considering the overall position of the company and subsequently, the company assets.

Secondly, the purpose of the moratorium is to protect companies under significant financial difficulty, against the possibilities of facing outside pressures. Most commonly, these outside pressures will emanate from creditors attempting to protect themselves, against the risk that the company will fall into insolvency. The act of creditors reverting pressure on the insolvent company, can have catastrophic consequences on the possibility of the company being rescued. Under these circumstances, the creditors will seek to take specific actions which serve and protect their own interests as creditors. Accordingly, the moratorium provides the distressed company sufficient breathing space to formulate possible rescue/ rehabilitation arrangements, whilst simultaneously preventing creditors acting in their own interests at the expense of the distressed company's rescue attempts. As such, companies are afforded a moratorium under the Insolvency Act 1986. Paragraphs 42 to 44 of Schedule B1 set out the provisions for the statutory moratorium, which allows companies to benefit from the protection of the moratorium.[904] Consequently, through the moratorium, creditors are prevented from gaining priority over one another or from seeking expensive legal recourse that will subsequently be dealt with during the course of administration.

As mentioned above, the moratorium prevents creditors or third parties from taking action against the assets of the company. More specifically, the provisions of Schedule B1 suspends any legal proceedings or processes against the company. This includes: suspending creditors from commencing

[904] Paragraphs 42 to 44, Schedule B1, Insolvency Act 1986.

insolvency proceedings against the insolvent company, suspending the right of any secured creditor from enforcing their security over any of the company's assets, suspending the right to repossess assets in the company's possession and suspending a landlord's right to forfeit any leases of the company's proceedings. As emphasised by Milman, imposing a moratorium is distinctive in the process of administration as it allows the 'freezing of hostile actions against the company that is intended to allow the administrator a vital breathing space to effect either a rescue of a more efficient winding up.'[905] Taking direct action against the assets of the company can only be done with the consent of the administrator or being granted permission by the court. Retention of title clause holders are thus prevented from taking immediate action until consent or permission has been ascertained, the process and implications of this requirement will be discussed in detail further below.

With regard to timeframe, the moratorium period is instigated from the moment the company enters administration and the administration process starts. Under paragraphs 42 – 43 of Schedule B1, the moratorium automatically applies from the moment the court makes the administration order or for an interim moratorium, the moratorium will take effect from the time the application for administration is issued at court.

Breaching the moratorium will give rise to serious consequences such as committing contempt of court or give rise to a claim in damages. It is noted that in practice, it is rare for creditors to be sanctioned for contempt of court for breaching the statutory moratorium in administration.

6.1.2 Schedule B1: Definitions and issues

6.1.2 (a) Property and Security

In order to fully discuss the implications of the statutory moratorium, emphasis will be given to certain definitions provided by the Insolvency Act 1986. In order to shed light on certain terms, where possible judicial pronouncements will be considered and any notable issues stemming from the definitions of the Act, which may hinder individuals who are directly impacted by the statutory moratorium will be discussed. Firstly, 'security' and 'property' will be considered.

[905] D Milman "Administration orders: the moratorium feature" (1992) 5(9) *Insolvency Intelligence,* 73-75, at 73.

As an overview, section 248(b) of the Insolvency Act 1986 sets out the definition for security which includes any mortgage, charge, lien or other security.[906] In the context of the above definition, security is afforded a wide definition by the Insolvency Act 1986. Additionally, in the case of *Bristol Airport v Powdrill*[907], the words 'lien or other security' were considered by Sir Browne-Wilkinson who contended that 'other security' ought to be given its natural meaning, which was sufficiently wide enough to encompass the issue of the case which was a statutory right of detention as a 'lien or other security' for the purposes of section 248(b) the Insolvency Act.[908]

Furthermore, in accordance with this 'property' over which the security must subsist is defined broadly under section 436 of the Insolvency Act, which states that 'property' includes:

'money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.'[909]

The Court of Appeal in *Bristol Airport v Powdrill* noted the difficulties arising out of the meaning of the term 'property' and emphasised the difficulty of employing a wider definition, particularly in the context of the latter half of the definition which includes things arising out of or incidental to property.[910] One of the issues in *Bristol Airport v Powdrill,* concerned whether aircraft that were leased could be defined under the meaning of property under section 11(3)(c), in which it was affirmed by Sir Browne-Wilkinson that a lessee has an equitable right in the aircraft and thus could fall under the definition of an interest arising out of or incidental to the property.[911]

However, despite the above attempts to clarify the terms, it has been submitted by Trower et al that the precise ambit of the words 'security' and 'property' will not be settled for some time and thus the prudent course of action for persons with rights against a company in administration is to seek the consent or permission of the administrator or court before attempting to exercise such rights.[912] It is evident that a degree of ambiguity surrounding the terms 'property' and 'security' still persists.

[906] Section 248(B), Insolvency Act 1986.
[907] *Bristol Airport v Powdrill* [1990] Ch 744.
[908] *ibid* as per Sir Nicolas Browne-Wilkinson at [760].
[909] Section 436, Insolvency Act 1986.
[910] *Bristol Airport v Powdrill*, *op cit* fn 907 as per Sir Nicolas Browne- Wilkinson at [759].
[911] *ibid.*
[912] W Trower, D Allison, A Goodison and A Shaw, *Corporate Administrations and Rescue Procedures, op cit* fn 902 at 41.

6.1.2 (b) Taking steps to enforce security

Retention of title holders are directly impacted by the statutory moratorium under Schedule B1 of the Insolvency Act. Firstly, as a point of reference, Section 251 of the Insolvency Act defines a 'retention of title agreement' as follows:

'retention of title agreement means an agreement for the sale of goods to a company, being an agreement- (a) which does not constitute a charge on the goods, but (b) under which, if the seller is not paid and the company is wound up, the seller will have priority over all other creditors of the company as respect the goods or any property representing the goods.'[913]

However, the crux of the issues hindering retention of title holders are found in paragraph 43(3) of the Schedule. Pursuant to Schedule B1 of the Insolvency Act, a contract that incorporates a retention of title clause is defined under 'hire purchase agreement' for the purposes of paragraph 43(3) which states:

'No step may be taken to repossess goods in the company's possession under a hire-purchase agreement except- (a) with the consent of the administrator, or (b) with the permission of the court.'[914]

In this circumstance the definition of hire purchase agreement also extends to conditional sales agreements and chattel leasing agreements as per paragraph 111, Schedule B1.

It has been noted that the definition prescribed to retention of title clause under section 251 is peculiar and almost unnecessary.[915] With regard to limb (a), there seems to be a direct overlap with provisions covered by para 43(2) which refers to security, as limb (a) effectively excludes mortgages or charge agreements. Moreover, this is distinctly odd as if the agreement is a mortgage or charge then it cannot be a sale agreement. The peculiarities also extend to limb (b), as the definition once again overlaps with the definition of a conditional sale and more so, it is difficult to think of a retention of title clause which does not fall within the definition of a conditional sale agreement. As such, one may question the need for a separate definition, as retention of title clause agreements could have easily been included within the definition of a conditional sale agreement. It has been observed that limb (b) seeks to ascribe a conditional sale agreement with a legal effect, which it may not necessarily have, as the legal effect is dependent on the nature of the legal priority rules.[916] Within the context of retention of title clauses, potentially there may be a party with a stronger title to the goods if the

[913] Section 251, Insolvency Act 1986.
[914] Paragraph 44(3), Schedule B1, Insolvency Act 1986.
[915] R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 433, para 11-63.
[916] *ibid.*

retention of title clause seeks to cover proceeds of sale, which will almost certainly be categorised as creating a charge, rendered void for lack of registration. Accordingly, one cannot ascribe a legal effect to a sale agreement as it is entirely dependent on legal priority rules. Furthermore, it is clear from the precise wording of paragraph 43(4), that such a provision limits the effectiveness of retention of title clauses. The precise implications of paragraph 43(3) for retention of title holders is discussed in detail further below.

A further definitional issue of the Schedule can be exemplified by the lack of coherent definition to the word 'step'. Indeed, 'step' has not been adequately defined by the Act and as such the precise meaning of taking steps to enforce security or repossess goods remains unclear. Uncertainty exists in deciphering the meaning of what constitutes 'taking steps' as it is unclear to whether this refers to preparatory acts of enforcing security. A case decided under the original provisions of the Insolvency Act may prove instructive in relation to helping us clarify the uncertainty of defining 'step'. In *Sabre International Products Ltd*[917] it was held by the Court that the assertion by a lien holder, of a statutory right retaining goods subject to the lien, did constitute the taking of steps to enforce security, and subsequently, consent needed to be obtained. In this case, a lien holder refused to return goods to the administrators, who demanded delivery of the company's goods. The court held that the lien holder had to deliver the goods and that the administrators in this instance were acting as officers of the court and were entitled to the possession of the goods, as the lien holder had not sought an application to the court to enforce their security. This case is illustrative as although the administrators have a duty to act fairly and reasonably during the administration process, this does not extend to telling the lienholder what steps it should take to protect its security. Accordingly, the duty of administrators does not extend to informing secured creditors on what steps they should take to enforce their security. Retention of title holders will thus not be informed by administrators on what steps they should take to enforce their claim.

The precise meaning of the prohibition against 'taking steps' in the context of enforcing a lien, was also raised in *Bristol Airport v Powdrill*. This case involved a creditor of an insolvent charter airline not being able to exercise a lien over property belonging to a company, without seeking the consent of the administrator or permission by the court. In this case, the applicant was an airport operator who was not entitled to exercise his lien over the property, which was an aircraft. Subsequently, detaining an aircraft by parking a lorry in front of the property amounted to taking steps to enforce security which ultimately triggered the application of section 11(3)(c) of the Insolvency Act, requiring either

[917] *Re Sabre International Products Ltd* [1991] B.C.L.C. 470; [1991] B.C.C. 694; [1991] 2 WLUK 123.

the administrator's consent or leave of the court to be ascertained before exercising their right of lien. In this case the court provided clarification by accepting that taking a step imports an overt act or a positive act of reliance on his rights.[918] Furthermore, within the meaning of section 11(3)(c) of the Insolvency Act, the exercise of a right of lien by an overt act of detention, constituted a step taken to enforce security.[919] The Court of Appeal seemed to have accepted that in the majority of cases, it would be obvious whether or not a step has been taken, however it was submitted that situations involving a refusal to hand over possession raised further difficulties. Accordingly, the *Bristol Airport v Powdrill* case provided some clarification in supporting the view that the exercise of a right to retain under a lien constitutes the enforcement of the security. No such actions can be done without the consent of the administrator or permission of the court. However, the issue surrounding a refusal to hand over possession is particularly prevalent for retention of title cases and as such, it might not always be clear when a step has been taken in the context of a retention of title case. Do preliminary actions such as facilitating phone calls/ establishing communication to prepare for possession of goods, amount to taking steps? It is unclear how far the boundaries extend for taking preliminary steps in the context of retention of title cases or any other hire purchase arrangement. Despite the court claiming that it would be obvious whether a step has been taken, for retention of title holders, this is not always clear cut and as such, uncertainty still ensues. It is evident that retention of title holders' actions are ultimately restricted, even if such actions are only preparatory in nature. In order to avoid breaching the provisions, retention of title holders will have to cautiously seek permission from the administrator or court regardless.

A similar issue of regarding the definition of 'taking steps' to enforce security and repossess goods was alluded to in the case of *Barclays Mercantile v Sibec Developments.*[920] In this case Millett J regarded the difficult issue of whether making a demand for the return of goods amounted to a cause of action in conversion and consequently constituting taking steps to repossess goods in the company's possession. However, Millett J declined to comment on this issue as the issue itself was not paramount for his decision. Trower et al, provided some commentary on this issue and were of the opinion that provided that the demand was not complied with, the making the demand would not constitute taking steps to repossess the goods:

'With some diffidence, however, it is submitted that, provided the owner of the goods made it clear that in the event the demand was not complied with, he would seek the consent of the administrator

[918] W Trower, D Allison, A Goodison and A Shaw, *Corporate Administrations and Rescue Procedures, op cit* fn 902 at 42.
[919] *Bristol Airport v Powdrill, op cit* fn 907 at [749].
[920] *Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd* [1992] 1 WLR 1253.

or the permission of the court to take proceedings to recover the goods, the making of such a demand would not, in itself, constitute the taking of a step to repossess the goods.'[921]

Similarly, Judge Weeks in *Re David Meek Plant*[922] declined to discuss an analogous issue of whether serving a terminating notice of a hire-purchase agreement would constitute taking a step in enforcing a security. In the case, Judge Weeks stated, 'I do not propose to decide question of whether serving a notice is any step to enforce security and I will attempt to disregard the lacuna that might otherwise arise.'[923] Judge Weeks choice of words 'lacuna' is reflective of the reluctance of the courts to clarify difficult and somewhat open-ended circumstances which may constitute taking steps to enforce a security. It is submitted that this is a missed opportunity to deal with the issues surrounding the terms 'taking steps'.

As such, there is a recurring theme of judicial reluctance to offer clarification and ultimately tackle difficult scenarios which fall under the remit of taking steps. We await judicial commentary to fully resolve the issues discussed above. As such, the precise meaning of taking steps to enforce security or repossess goods has been subject to rigorous judicial pronouncement, however despite this, ambiguity remains.

6.1.2 (c) Duration

More significantly, Schedule B1 does not directly specify the duration of the interim moratorium. Rather, the duration of the moratorium parallels the process of administration appointment, which is usually around 12 months but may be extended further.[924] As such, the length of the moratorium is dependent on whether there is a court or out-of-court appointment. Paragraph 44(1) infers that the interim moratorium starts from the day that the administration application has been granted until the administration order takes effect. For an out-of-court administration appointment, the date is set from the issuing of notice of intention to appoint administrators until the date of appointment. Or

[921] W Trower, D Allison, A Goodison and A Shaw, *Corporate Administrations and Rescue Procedures, op cit* fn 902 at 43.
[922] *Re David Meek Plant Ltd* [1994] 1 BCLC 680 at [684a].
[923] *ibid* as per Judge Weeks QC at [178].
[924] The Insolvency Service, *A Review of the Corporate Insolvency Framework: A consultation on options for reform* (2016) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf Accessed 16/01/20.

conversely, if no administrators are appointed, paragraph 28(2) states it will be ten business day from the date on which the notice of intention to appoint is filed.

A case which considered the duration of the moratorium was *JCAM Commercial v Davis Haulage Ltd.*[925] The court found that the interim moratorium that arose out of filing a notice on the 22nd of January 2016, expired at the end of the 5th February 2016, following the operation of paragraphs 44(4) and 28(2) of Schedule B1.[926] The court did not provide further guidance beyond the end of the day on the 5th of February and thus, a degree of uncertainty still exists in specifying an exact expiry of the duration of the moratorium. Any retention of title holder impacted by an interim moratorium, must seek the permission of the courts to exercise their rights during this period. Due to the very nature of administration proceedings, there is unlikely to be enough time to seek the co-operation of all creditors involved.[927] As aforementioned, the purpose of administration and imposing a moratorium is to provide a period of breathing space on the enforcement of rights, as such the administration process should only be temporary[928], however this can still cause issues for those seeking to enforce their rights. Those seeking to exercise their proprietary rights should only be prevented from doing so on a strictly temporary basis.[929] Further problems relating to the duration of the moratorium are highlighted and discussed in detail below.

6.1.2 (d) Potential impact of the Corporate Insolvency and Governance Act 2020

The discussion will now briefly consider the potential impact of the new self-standing moratorium introduced by the Corporate Insolvency and Governance Act 2020 on retention of title clauses.[930] The purpose behind the new rescue procedure is to enhance the restructuring culture for companies in financial difficulty by introducing a new standalone moratorium, directed at rescuing companies as a going concern. Similar to the provisions contained in Schedule B1 of the Insolvency Act, this new moratorium procedure provides breathing space for companies to formulate a rescue plan without incurring significant costs. The moratorium is available to a company under financial difficulty where it is likely that the moratorium will result in the rescue of the company.[931] The self-standing

[925] *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd* [2017] EWCA Civ 267.
[926] *ibid* at [16].
[927] A Bacon and R Cowper "The moratorium emasculated- another blow for corporate recovery?" (1997) 10(10) *Insolvency Intelligence,* 73-75, at 74.
[928] P Fidler "Administration: leave to enforce security on property rights" (1991) 6(2) *Journal of International Banking Law,* 78-81, at 80.
[929] *ibid.*
[930] The Corporate Insolvency and Governance Act 2020 came into force on the 26th of June 2020.
[931] Part A6 of the Insolvency Act 1986 as inserted by the Corporate Insolvency and Governance Act 2020.

moratorium provides for a period of 20 business day protection against any creditor action, which may also be extended with the consent of the pre-moratorium creditors or the courts[932], thus inevitably impacting on the ability of retention of title claimants to enforce their proprietary rights. Section A21 directly impedes the position of retention of title claimants as during the period of the standalone moratorium, creditors are prevented from repossessing their goods and enforcing their security or other proprietary rights.[933] Once again, this impedes the position of retention of title claimants as the Corporate Insolvency and Governance Act 2020 prioritises the recovery of the company rather than the realisation of assets. It appears that monitors have less pervasive roles than the position of administrators under Schedule B1 of the Insolvency Act 1986 as notably the new moratorium can only be lifted by the courts, neither the directors nor monitors can lift the restriction on enforcement. This will inevitably impede retention of title clauses from realising their assets in a timely manner and will undoubtedly add to the overall financial costs of enforcing their rights.[934]

It is speculated that the position of retention of title claimants in relation to this new moratorium will mirror the position under Schedule B1 of the Insolvency Act 1986 and we wait patiently to see the full extent of the self-standing moratorium on enforcing security and proprietary interests and how the existing law on the statutory moratorium and the new moratorium procedure will coincide in practice.[935] Accordingly, the true impact of the standalone moratorium is not widely known at this stage as the procedure will need to be navigated in practice and clarified by the courts.[936] Any remaining uncertainties can only be resolved by litigation. Evidently, the inherent tension between the recovery expectations of third parties such as retention of title claimants and the self-standing moratorium is likely to be rigorously tested during the following months and the full impact remains to be seen. For such reasons, the following discussion will focus on the implications of the moratorium in administration under Schedule B1 of the Insolvency Act 1986, as this area of law has been subject to considerable judicial pronouncement.

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[932] A9(2) of the Insolvency Act 1986. The author acknowledges that the period of moratorium is relatively short, 20 business days commencing on the day after the moratorium comes into force.

[933] See A21(1)(d) of the Insolvency Act 1986. A54 of the Insolvency Act 1986 provides a broad definition of 'hire purchase agreement' which includes 'a conditional sale agreement, a chattel leasing agreement and a retention of title agreement.

[934] It is worth noting here that the creditor seeking leave has the burden of persuading the court to grant leave. See further section 6.2.1.

[935] During these unprecedented times of the Covid-19 pandemic, the legal and economic landscape is understandably uncertain. See further, L Linklater and J Wildridge "Changing times: aspects of creditor enforcement in administration and in the new moratorium" (2020) 33(3) *Insolvency Intelligence,* 96-98 at 96.

[936] At the time of writing, the application of *Re Atlantic Computer Systems Plc* [1992] 2 WLR 367 on the new moratorium procedure remains to be seen. For a detailed discussion on the application of *Re Atlantic Computer,* see section 6.2.1 in the context of how retention of title clauses are dealt with on administration.

6.1.3 The effect of the moratorium and implications for retention of title holders

6.1.3 (a) Suspending the substantive rights of creditors

A secured creditor will be prevented from enforcing its security during the moratorium unless the parties seek the consent of the administrator or permission of the court. Furthermore, by virtue of paragraph 43(3) of Schedule B1 of the Insolvency Act 1986, once a moratorium has taken effect, a retention of title holder is prevented from taking steps to repossess the goods, which are still in the possession of the company. Accordingly, paragraph 43(3) states:

'no step may be taken to repossess goods in the company's possession under a hire-purchase agreement except-

(a) With the consent of the administrator

(b) With the permission of the court'[937]

It was established in *Barclays Mercantile v Sibec Developments*[938] that the moratorium does not alter or extinguish creditor's substantive rights, but instead merely suspends them. It was held by Millett J that imposing a moratorium on the enforcement of a creditor's legal rights does not alter or destroy such rights and consequently, the immediate right to possess the goods will not be removed. This case concerned a hire-purchase agreement which leased motor vehicles and computer equipment to Barclays Mercantile. The applicants initiated the repossession of the goods without gaining the consent of the administrators. Justice Millet was of the opinion that:

'those paragraphs [section 11(s)(c) of the Insolvency Act] presuppose that both the legal right to enforce the security or repossess the goods and the cause of action remain vested in the party seeking leave. By giving leave the court does not alter the parties' legal rights. It merely grants the person having a legal right liberty to enforce it by proceedings if necessary. The section imposes a moratorium on the enforcement of the creditor's rights but does not destroy those rights.'[939] Accordingly, under the scope of Schedule B1, the provisions suspend the right of a secured creditor to enforce their security over the assets of the company and suspend the right of the creditor to repossess assets in the company's possession.[940] On further analysis, it is emphasised that the rights remain but are temporarily frozen and stayed until either consent from the administrator or

[937] Paragraph 43(3) of Schedule B1 of the Insolvency Act 1986.

[938] *Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd, op cit* fn 920.

[939] *ibid* as per Justice Millet at [1257].

[940] The author acknowledges that Schedule B suspends other rights such as right to forfeiture, ability to commence insolvency proceedings against the company and the ability to commence any other form of legal process against the company.

permission of the court is sought or until the moratorium has ceased. Subsequently, the moratorium prevents creditors from enforcing their securities for a period of time, however this is not meant to prejudice the interests of the creditors. As the moratorium prohibits any steps or processes being commenced against the distressed company, sellers of goods will require the consent of the administrator or permission of the court, before taking possession of the goods.

In the context of balancing entitlements, imposing a statutory moratorium has been heavily criticised by Milman for being 'based upon a utilitarian premise that the interests of a few may need to suffer in the service needs of the many.'[941] The company in financial difficulty can benefit from the protection afforded by the moratorium, however creditors and other third parties with claims are suspended from exercising their rights. The strength and utility of retention of title claims are severely weakened by the need to ascertain permission by an external body in order to enforce their claims. The restrictions imposed by the moratorium on retention of title holders, is clearly indicative of the situation outlined by Milman above, where the notion of collectivism is rife.

In line with this reasoning and expanding on the points raised by Milman, the creditor's rights or more specifically, any retention of title holders are detrimentally impacted by the statutory moratorium as the moratorium period can affect the commercial value of goods. Depending on the duration of the moratorium, this could lower the commercial value of the goods which are subject to a valid retention of title clause. For retention of title holders seeking to repossess goods which are in the possession of the other party, such actions are time critical. This is even more significant for holders of retention of title clauses selling goods of fluctuating value, as the value will be affected by the duration of the moratorium, which can fluctuate and be subject to long postponements as will be evidenced by case law, discussed further below. Wheeler states that under the Insolvency Act, the moratorium can last longer than a year as the tenure of the administrator is not subjected to a time limit.[942] If a moratorium lasts for a substantial length of time, this bears significant risks and implications on retention of title holders, who would be exposed to additional deferments in waiting to seek leave from the administrator or court.

In addition, it is evident that creditors' substantive rights are hindered by the moratorium, which subsequently suspends, and essentially restricts the enforcement of security and the right of a creditor to repossess assets which are not in their immediate possession. During the moratorium period, goods

[941] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 90.
[942] S Wheeler "Insolvency Act 1986 and retention of title clauses" (1987) 8(6) *Company Lawyer,* 277-280, at 277.

under hire-purchase agreements (for which retention of title clause are categorised) cannot be repossessed until leave has been granted by the court.[943] Consequently, the commercial utility of such rights is limited as those seeking to enforce their security must face additional administration and timely delays. In relevance to retention of title clauses, their popularity in the commercial market derives from their relatively simple incorporation and the protection which is afforded to holders in the event of insolvency. However, this purported protection is ultimately weakened by the statutory moratorium as rights are suspended until leave is granted to lift the moratorium. Notwithstanding the risk that the administrator or court may deny the retention of title claim during the process of administration and reject their application for leave. Accordingly, the protection given to retention of title holders, which allegedly affords them priority over all other creditors in respect of goods is impeded, until consent or permission has been granted by the administrator or court. Based on the notion of collectivism, holders of retention of title clauses need to realise the assets of the company in a timely fashion and thus any disruption to this process causes significant problems for retention of title holders.

As such, this evidences one of the main limitations on the effectiveness of retention of title clauses, that if the buyer is a company in administration, the rights of holders of retention of title clauses and other creditors are suspended by the moratorium under the provisions of Schedule B1. It is evident, that the suspension of rights as afforded by the statutory moratorium prevents retention of title holders from acting in a manner which would ultimately benefit themselves.

6.1.3 (b) Disposal of goods

Furthermore, holders of retention of title clauses are exposed to further risks, most notably that goods subject to a retention of title clause can be disposed of by an administrator. Once an administrator is appointed, an administrator is granted considerable power, pursuant to para 70 to 72 of Schedule B1 of the Insolvency Act, an administrator is granted the power to deal with charged property (formerly s15 of the Insolvency Act 1986). By virtue of paragraph 72, through an order made by the court, the administrator can dispose of goods in the possession of the company under a hire-purchase agreement. This applies to retention of title clause agreements, conditional sale agreement and chattel leasing agreement, all of which are encompassed under the definition of a hire-purchase agreement.

[943] *ibid.*

If the holder of the security or owner of the goods under a hire-purchase agreement consents or alternatively if the court grants leave, then the goods may be disposed of, as if the rights of the holder of the security or owner under the hire purchase agreement were vested.[944] Where the court is satisfied with the disposal, an administrator may exercise his powers to dispose of any property of the company which is subject to a security. The court may authorise the disposal if they are satisfied that one or more of the specified purposes in the administration order have been met. In deciding whether to dispose the goods that are subject to a hire-purchase agreement, the court must balance the competing interests of the owner of the goods and the general body of creditors. Additionally, in the process of making an application to the court for an order under paras 71 and 72, notice must be given by the administrator to the holder of the security, or the owner under the hire purchase agreement. Accordingly, in the event of the courts making an order which subsequently authorises the disposal of property of goods by the administrator, the parties must be notified and thus afforded the opportunity to participate in the hearing.

This epitomises the contention that the rescue culture is based upon a utilitarian premise, whereby administrators are granted the power to sell goods and realise property, despite the fact that the goods do not belong to the company in question. The administrators have the power to sell goods on the basis that such actions would be for the interest of the company as this would ultimately benefit stakeholders and encourage the efficient realisation of assets.[945] Once again, it is clear that the moratorium fails to strike the appropriate balance between creditors' rights and administration rescue attempts. In this context, the utility of a retention of title clause is impeded during the moratorium, if such goods can be disposed of by an administrator on the relatively simple basis of balancing competing interests. This supports the underlying hypotheses that the effectiveness of a retention of title clause is hampered to a significant extent by various factors.

The issue of disposal of goods can be exemplified by *Singh Sandhu v Jet Star Retail.*[946] In this case, a manufacturer supplied clothing to a retailer under a contract which included a retention of title clause. The retention of title clause provided that ownership of the goods would remain with the supplier until such goods had been paid for in full and in the event of insolvency, the supplier could require the retailer not to dispose of such goods until they had been paid in full. The retailer had fallen into

[944] P Totty, G Moss and N Segal, *Totty, Moss & Segal: Insolvency,* Volume 2, FT Law and Tax, London: Sweet & Maxwell, 1996 at 1-16.
[945] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 90.
[946] *Bulbinder Singh Sandhu (trading as Isher Fashions UK) v Jet Star Retail Limited (in administration)* [2011] EWCA Civ 459.

financial difficulty and administrators were subsequently appointed. During administration, the retailer continued to trade and sold stock which the retailer had not paid for. Consequently, the business and the supplier's stock (which had still not been paid for in full), was sold to a third party. As a result, the supplier sought damages for conversion, relying on the retention of title clause to claim damages for the stock of clothing supplied.[947] In the first instance, the judge held despite the existence of the retention of title clause, the retailer had implied authority to sell or dispose of the goods until the supplier exercised its rights to withdraw authority. Due to the fact that the seller had not taken steps to withdraw its authority, the retailer was entitled to dispose of the goods in both instances; the first during administration where the retailer continued to sell stock and secondly, where the business and stock were ultimately sold to the third party.

The supplier appealed on the grounds that the retailer ceased having authority to sell and dispose of the goods once the business became insolvent and entered administration. Accordingly, the basis of the appeal was that any sale or disposal of the goods once entered into administration amounted to wrongful interference with the goods.[948] The appellants relied on the reasoning that the effect of a retention of title clause is analogous to that of a floating charge. Subsequently arguing that in the case of a floating charge, the distressed company's authority to dispose of its assets is limited to disposals made in the ordinary course of business and subsequently, ceased on insolvency. Lord Justice Moore-Bick, disagreed with this rationale, instead opting that the right to dispose of the goods derived from the individual terms of the contract and its commercial object and as such should be decided on the facts of each individual case.[949] With regard to the crux of the case, the Court of Appeal in agreement with the original court held that the supplier took no steps to withdraw his authority. Accordingly, Lord Justice Moore-Bick stated that: '[supplier] took no steps in his capacity…to withdraw its authority to dispose of the goods at any time before the sale of the business to Internacionale was complete, although he was well aware of its financial difficulties and of the appointment of the administrators.'[950] It was held that there was no wrongful interference with the goods, by disposing of the goods during the process of administrator or selling the business and stock to the third party. To clarify further, there was an implied right to deal with the goods until the point of authority was brought to an end and as the supplier had not acted upon his authority, the court adopted a commercial interpretation

[947] *ibid* at [2].
[948] *Bulbinder Singh Sandhu (trading as Isher Fashions UK) v Jet Star Retail Limited (in administration*), *op cit* fn 946 at [6].
[949] *ibid* at [11].
[950] *ibid* as per Lord Justice Moore-Bick at [15].

of the clause in concluding that no express termination of authority had been effected.[951] From a practical standpoint, in order for retention of title clauses to be effective in affording considerable protection to suppliers, suppliers must now exercise the rights that they hold under their clause. Suppliers must exercise their rights by withdrawing the authority for buyers/ retailers to sell and dispose of the goods. Following the aftermath of *Jet Star Retail,* parties seeking to rely on retention of title clauses will nonetheless have to ensure that the terms and conditions which incorporate a retention of title clause, contain provisions which assert that during the distressed company's current or impending insolvency, the supplier requires the return of all its goods which remain in the possession of the buyer and a provision which allows the supplier to enter the retailer's premises to recover the goods.[952]

Another fundamental provision to include and act upon pertains to the removal of the right to sell goods in the ordinary course of business. Despite the position of the retailer having a right to resell the goods in the ordinary course of business as evidenced by the *Jet Star Retail* case, suppliers must exercise and act upon this right of removal to avoid the implications described above. Exercising the supplier's removal of the right to resell the goods in the ordinary course of business is clearly complicated by the statutory moratorium in administration. The statutory moratorium clearly prevents the supplier from threatening the distressed company and administrators with a claim in conversion as it prohibits claimants from taking any steps against the distressed company, without the consent of the administrator or permission of the court. For retention of title claimants to succeed in a claim for conversion where buyers have wrongfully interfered with goods, they must seek the administrators consent or permission of the court in order to withdraw its authority at the earliest opportunity. It is evident that prolonging or refraining from taking immediate action of withdrawing authority will result in failure as demonstrated by the *Jet Star Retail* case. Despite the supplier having a well-drafted set of terms and conditions which incorporate a valid retention of title clause, this will not assist the supplier in the event of insolvency unless the supplier exercises its rights as early as possible.[953]

Another ramification of the statutory moratorium for retention of title claimants is that the above scenario of needing to exercise rights to withdraw authority to sell and dispose goods, has the impact

[951] D Milman "Security Interests and quasi-security claims in UK corporate insolvency law: current issues", *op cit* fn 900 at 3.
[952] S Beale and G Butcher "The winner takes it all: who loses most in retail insolvencies?" (2015) *Corporate Rescue and Insolvency,* 218-220, at 218.
[953] *ibid.*

of severely weakening the bargaining position of retention of title claimants. When claimants are dealing with goods of a low scrap value or low resale price supplied with a retention of title clause, the supplier may not wish to reclaim possession as the commercial value of such goods may not be viable and subsequently, not worth pursuing the immediate possession of its goods. Accordingly, under these circumstances the supplier's claim for conversion would be for value of the goods rather than the outstanding debt and as such goods of low scrap value or low resale price may be of little commercial interest and worth.[954] Instead, suppliers opt to use the threat of a claim of conversion to negotiate better deals. As emphasised by Beale, a supplier may 'use the threat of a claim of conversion as a bargaining tool to negotiate a higher payment in settlement.'[955] However, following the outcome of *Jet Star Retail* where it was held that there was no wrongful interference with the goods and the supplier was unable to seek damages for conversion. This results in the weakening of suppliers bargaining position if the distressed company and administrators are aware that claims for conversion are contingent on the supplier exercising their rights at the earliest opportunity and are likely to fail if no such withdrawal of authority is actioned. The unlikelihood of success of a claim for conversion undermines the supplier's bargaining position to negotiate higher payments.

The implications and pitfalls of suppliers using retention of title clause agreements as a means of negotiating can be exemplified by the case of *Blue Monkey Gaming*[956] which included a failed claim of conversion by the suppliers. MDM had supplied gaming machines subject to a retention of title clause to Frankice Ltd, who was a member of a group of companies, named the Agora Group. The retention of title clauses stipulated that legal ownership of the goods would be retained by the seller until the final settlement had been made, however the complexities of the terms varied considerably. Following the administration of the Agora Group, MDM claimed to be owed almost £4 million in respect of the gaming machines which were supplied subject to the retention of title clause. When MDM went into creditors voluntary liquidation, the claim was assigned by the liquidator to Blue Monkey Gaming Ltd (BMG). BMG subsequently claimed damages of more than £7 million against the administrators for causing Frankice to use MDM's gaming machines to make money for the administration and for failing to deliver machines to MDM following a demand for their return. The court held that the administrators had never converted nor wrongfully interfered with MDM's machines and their claim was subsequently dismissed. The court determined that the alleged demand for the return of the goods was not a genuine demand, rather it was a tactic which allowed the goods to remain in situ with

[954] *ibid.*
[955] S Beale and G Butcher "The winner takes it all: who loses most in retail insolvencies?", *op cit* fn 952 at 218.
[956] *Blue Monkey Gaming Ltd v Hudson* [2014] 6 WLUK 458.

a view to strike up a deal with a new prospective buyer.[957] HHJ McCahill QC held that 'it was mere posturing rather than expression of a genuine desire to recover the machines. It was not a genuine demand.'[958] The demand for the goods was also deemed inadequate as the evidence submitted by MDM failed to identify the property which was subject to a retention of title clause. MDM had failed to identify the number, type, manufacturer's serial number or location of the machines to which it was claiming ownership.[959] Following the case of *Blue Monkey Gaming,* it is evident that suppliers will need to be particularly cautious in reserving their rights and to be transparent on exactly what terms relating to possession are permitted for companies.[960] When demanding goods, retention of title claimants will also have to clearly identify the goods and location in as much detail as possible.

To avoid the consequences of *Jet Star Retail* and *Blue Monkey Gaming* it may be advantageous for suppliers to withdraw the company's rights to sell the goods as soon as it is feasible, in order to reduce any doubts of the supplier's intentions and providing sufficient evidence to the court, if needed. In the situation where retention of title claimants take no action to negotiate for the continued use of goods, it likely that the courts will interpret this as the claimants having consented to such use gratis, and as such retention of title claimants must act accordingly. Alternatively, another riskier recourse for this situation may be to incorporate a clause in the contract from the onset, seeking to avoid the above situation altogether by stipulating that the supplier will withdraw his authority automatically after a set period. However, it may be argued that incorporation of this term may prove difficult, especially in trying to get the buyer to assent to such terms from the onset. But if the term is successfully incorporated, this approach would once again bypass the consequences highlighted by the two cases above. Although it is submitted that the former approach is much less risky than attempting to incorporate a further term within the contract. Beale suggests an alternative approach by recommending suppliers to send lorries to recover the goods at the earliest possible opportunity before any moratorium as [suppliers] 'may find directors a more attractive pressure point that a subsequent administrator and may hope to act before any form of moratorium is in place.'[961] Clearly, this emphasises the inherent difficulties associated with the moratorium and advises suppliers to act prior to the imposition of the moratorium. The suggestion of recovering goods by sending lorries at the earliest opportunity, epitomises the despondency of the situation once a moratorium has come

[957] *ibid* at [429].
[958] *ibid* at [525].
[959] *ibid* at [516].
[960] S Beale "No respite for retail: the sector that keeps on giving" (2017) *Corporate Rescue and Insolvency,* 117-120, at 118.
[961] *ibid.*

into place, and thus it may be to the advantage of suppliers to do all that they can to preserve their position from the outset.

6.1.3 (c) Causes significant disruption

Taking a holistic approach, some stakeholders of the company, most notably directors or the associated workforce of the distressed company will benefit from the possibility of rehabilitation during the moratorium.[962] Accordingly, the alternative argument to the one put forward throughout this chapter would be that incidentally the moratorium could also benefit creditors and retention of title holders. Considering the purpose of administration and conditions for making an administration order. Paragraph 11 of Schedule B1 states:

'The court may make an administration order in relation to a company only if satisfied—
(a) That the company is or is likely to become unable to pay its debts, and
(b) That the administration order is reasonably likely to achieve the purpose of administration.'[963]

As such, the statutory moratorium affords creditors the opportunity to recover their debts through providing the possibility of rehabilitation or rescue of a distressed company which is reasonably likely to succeed in the purpose of administration. It is also appreciated that the moratorium has the potential to afford creditors a better opportunity to recover debts, compared to the unfavourable prospects of recovery in the event of insolvency. However, in order to refute this claim, it is submitted that there is no guarantee that the distressed company can be salvaged by rescue procedures, irrespective of whether administration prospects are reasonably likely. Furthermore, the uncertainty of this is emphasised by the lack of empirical research conducted which affirms that the prospects are greatly enhanced by effective rescue models compared to the minimum amount expected to receive on the liquidation of a company.[964] Of course, there are notable examples of successful administrations to recount, however this area is still lacking sufficient statistics on the apparent success facilitated by the statutory moratorium.[965] Additionally, there is further uncertainty as to the criterion of a successful rescue which in fact may be less encouraging that the term suggests, with the

[962] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 90.
[963] Paragraph 11, Schedule B1, Insolvency Act 1986.
[964] See generally, D Milman "Moratoria on enforcement rights: revisiting corporate rescue" *op cit* fn 903 at 95, where Milman emphasises the limited empirical research in this field and refers to his own empirical research which focuses on the performance of CVAs: See D Milman and F Chittenden, *Corporate Rescue--CVAs and the Challenge of Small Companies*, ACCA Research Report No.44, 1995; G Cook, N Pandit and D Milman [2000] 38 Jo. of Small Bus. Man. 78; N Pandit, G Cook, D Milman and F Chittenden [2000] 7 Jo. of Small Bus. and Ent. Dev. 241.
[965] See further, I Fletcher, *The Law of Insolvency,* 3rd Ed, London: Sweet & Maxwell, 2002, at 515.

notion merely referring to the orderly realisation or sale of assets/ the company.[966] Despite the limited empirical research on the prospects of companies being salvaged by the statutory moratorium, confirming that the rescue procedure does indeed enhance the prospects of companies being rehabilitated, the insolvency statistics produced by the government, consistently report high levels of administrations.[967] During the first quarter of 2019, there were 451 administrations, which amounted to the highest number of administrations over the last five years.[968] In 2020, the total number of administrations decreased to 404.[969] These figures serve to emphasise that the high number of administrations can significantly impede or delay those seeking to claim their goods under retention of title clauses. Despite the honourable intentions of administration, in reality this could be of detriment to any potential creditors/ retention of title holders seeking a quick adjudication of their claim due to the fact that they will ultimately be subjected to further delays, disruptions and uncertainties.

Another factor which delays retention of title holders in dealing with their claim in a timely manner is that they themselves bear the responsibility of identifying and providing title to the goods. The case of *Blue Monkey Gaming* also clarified that the seller of the goods bears the responsibility for identifying and proving title to the goods under a retention of title clause and not the administrator.[970] HHJ McCahill QC held that the administrators were not obliged to compile an inventory of assets nor obliged to identify machines owned by individual third parties.[971] The extent of the administrators' obligation is to 'permit and supervise access to an alleged owner to enable it to identify its own goods and then to adjudicate on any claim arising on the basis of all the evidence supplied.'[972] In practical terms, retention of title claimants must ensure that they compile a detailed inventory of claimed assets and arrange an appointment with the administrator to identify and segregate those assets. Retention of title holders must submit adequate evidence supporting their claim which clearly

[966] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 341.
[967] The Insolvency Service, *Companies Insolvency Statistics, Q1 January to March 2019,* (2019) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/798393/Commentary_-_Company_Insolvency_Statistics_Q1_2019.pdf Accessed 04/08/2020.
[968] *ibid.*
[969] The emergence of the coronavirus pandemic may have impacted the overall insolvency statistics as insolvency practitioners, Companies House and the courts were not able to process insolvencies in the usual manner during the first lockdown period. Additionally, the overall numbers of insolvencies remained low during this period partly driven by the Government responses measures to the coronavirus pandemic. As such caution needs to be applied when interpreting these statistics. See further, The Insolvency Service, *Monthly Insolvency Statistics, June 2020,* (2020) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/905189/Monthly__Insolvency_Statistics_June_2020_-Updated.pdf Accessed 04/08/2020.
[970] E Baskind, G Osborne and L Roach, *Commercial Law, op cit* fn 441 at 256.
[971] *Blue Monkey Gaming Ltd v Hudson, op cit* fn 956 at [155].
[972] *ibid.*

specifies the goods in question. It is clear from *Blue Monkey Gaming* that the court will not accept insufficient evidence such as invoices which fail to specify the goods subject to a retention of title claim nor prove that the clause was successfully incorporated into the contract.[973] Administrators allow retention of title claimants, under supervision, to segregate and make their goods identifiable by means of stickers/markers etc. to facilitate the final determination of the claim. The burden of identifying goods and establishing title falls solely on the seller of the goods claiming to retain title. As such, the moratorium continues to suspend the enforcement of rights and provides significant disruption to those affected, including retention of title holders.

6.2 Lifting the moratorium

The burden of proof rests on the party seeking to lift the moratorium.[974] If a retention of title holder seeks to bring an action against a company in administration, they must gain the consent of the administrator or be granted permission by the court. As such suppliers of goods are unable to rely on their contractual rights of recovery until they have obtained permission.[975] No indication is provided by the Insolvency Act about how the courts or administrator will use their discretion in granting permission.[976]

In practical terms, it is often quicker to ascertain consent from the administrator rather than making an application to the courts. As such holders of retention of title clauses and those governed by paragraph 44 of Schedule B1 must face additional administrative duties and burdens of communicating to administrators requesting consent in order to exercise their rights. Such correspondence requires detailed information outlining their legal basis such as identifying whether they have any security or proprietary interests over the assets of the company and the detriment caused from suspending their legal rights by virtue of the moratorium. As aforementioned, the burden of proof lies on the party seeking leave and as such they must make an application promptly in order to satisfy that there is an arguable case. Accordingly, holders of retention of title clauses are subjected to further pressures of having to make their application in a timely manner and gather all of the required evidence. Of course, the administrator may refuse to grant leave on lifting the moratorium and as such the holders of retention of title clauses are unable to take proposed action until they obtain a court order granting permission. It is evident that those party seeking the courts permission

[973] See further, *Blue Monkey Gaming Ltd v Hudson*, *op cit* fn 956 at [419-429].
[974] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 99.
[975] D Milman "Administration orders: the moratorium feature", *op cit* fn 905 at 75.
[976] S Wheeler "Insolvency Act 1986 and retention of title clauses", *op cit* fn 942 at 277.

will incur cost and time ramifications. In practical terms, if the administrators refuse to provide their consent, then they are delayed further from exercising their rights, awaiting the permission of the courts. It is clear that holders of retention of title clauses are under substantial administrative burden in attempting to enforce security over their assets or repossess their assets which are not in their immediate possession.

6.2.1 Guidelines for granting leave

A body of case law has emerged concerning lifting the moratorium and subsequently granting leave to allow secured creditors to either enforce their security or to enable an owner of a hire purchase agreement or equivalent to repossess goods which are in the possession of the company in administration. Due to the ramifications involved in granting leave, such a decision must not be taken lightly by the court so accordingly, a court must take into account a number of considerations in the process of deliberating whether to grant leave. In *Re Atlantic Computer*[977] the court was invited to clarify principles to be applied on applications for leave, however the court was reluctant to do this as they did not want to limit the courts' discretion.[978] However, the court recognised the necessity for some general guidance for insolvency and legal practitioners and proceeded to make some general observations, which are discussed in detail further below.

In the general context of administration, the court is obliged to balance competing interests, particularly in situations which may impact the process of administration. But what is meant by the phrase to balance competing interest? To clarify this point, it has been consistently emphasised by case law that the court must balance competing interests of the secured creditor against any other creditors within the process of administration.[979] The notion of the courts balancing competing interests of a secured creditor on the one hand and the other general creditors on the other, arises in two administration situations. Firstly, the process of balancing such competing interests arises when an application is made to lift the moratorium and secondly, when an administrator intends to dispose of goods which are subject to a hire purchase agreement, as if the rights of the owner under the agreement were vested in. Accordingly, the following section will thus shed light on what the courts

[977] *Re Atlantic Computer Systems plc* [1992] 2 WLR 367.
[978] P Fidler "Administration: leave to enforce security on property rights" *op cit* fn 928 at 80.
[979] See further, *Re Meesan Investments Ltd* [1988] 4 B.C.C. 788 and *Bristol Airport Plc v Powdrill* [1990] Ch. 744; [1990] B.C.L.C. 585.

must consider in the context of balancing competing interests. In order to grasp the meaning of balancing competing interests, we turn to judicial pronouncement.

The Court of Appeal specified how the court or administrator should carry out this balancing exercise in the landmark decision of *Re Atlantic Computer.* In this case, several observations were made in relation to cases where leave is sought for parties attempting to enforce their existing security or proprietary rights, against a company in administration. The general observations made by the Court of Appeal can be summarised briefly as follows:

If granting leave to exercise the security rights or repossessing the goods is unlikely to impede the 'purpose' of administration, then in such normal circumstances, leave should be granted by the court. If granting leave would lead to the impediment of the purpose of administration, then this is when the court must carry out a balancing exercise of legitimate interests. The Court of Appeal found that a pragmatic approach should be taken in balancing individual and collective creditor rights. In addition, the guidelines laid down by the court also call for the exercise of judicial judgement, considering all of the circumstances of the case. The guidelines set by Nicholls LJ emphasised the need to give priority to proprietary interests of the secured creditor.[980] It is stressed that the administration procedure should not benefit unsecured creditors and consequently prejudice those who have existing proprietary rights. Additionally, leave will normally be granted in circumstances where such a refusal would lead to the creditor incurring significant loss. For this purpose, loss is defined widely, encompassing both direct and indirect financial loss. However, if greater loss would be sustained by others or if such a loss would be disproportionate to the benefit of granting leave, this may be a deciding factor in rejecting leave to lift the moratorium. All of the above factors may prove to be relevant in deciding whether the court should grant or refuse leave. Additionally, the court emphasised that the list is not exhaustive and further factors may prove to be material for example considering the general conduct of the parties.[981]

On the point of balancing interests of secured and unsecured creditors, we look to the case of *UK Housing Alliance*[982] where Martin Mann QC clarified 'the Court is required when considering whether or not to exercise its jurisdiction to grant permission to enforce its securities under paragraph 43 of Schedule B1 to balance the interests of the secured and unsecured creditors only if the relevant property is required for the purposes of administration.'[983]

[980] *Re Atlantic Computer Systems plc, op cit* fn 977 as per Nicholls LJ at [542].
[981] *ibid.*
[982] *UK Housing Alliance (North West)(in admin)* [2013] EWHC 2553 (Ch).
[983] *ibid* as per Martin Mann QC at [75].

The *Re Atlantic Computer* guidelines were considered and applied in *TPS Investment (UK) Ltd*[984]*,* a case which considered four applications which arose from the administration of a company, TPS Investments (UK) Ltd. For the purposes of this discussion, the third application will be considered and analysed. The respondent of this case, Hutchinson had applied for permission to enforce its security over commercial properties under paragraph 43 of Schedule B1. In determining the application and conducting the exercise of balancing competing interests, His Honour Judge Stephen Davies, emphasised that the court should grant leave where such situations are unlikely to impede the purposes of administration and that great weight must be given to proprietary interests.[985] Further clarification for giving sufficient weight to proprietary interests was provided by His Honour Judge Stephen Davies, who considered whether allowing Hutchinson to enforce his security would prejudice the interests of any unsecured creditors and secured creditors.[986]

Accordingly, it has been stressed that on this basis 'it is clear that proprietary enforcement rights are marginalised if substantial harm would be done to the administration.'[987] Adopting a balance of interest approach means that the retention of title holders and equivalents categorised under 'hire-purchase agreement' find their interests subordinated by the interests of the insolvent company or other creditors.[988] As such, despite best intentions to provide a flexible approach of balancing competing interests, it is evident that a fair balance between the general bodies of creditors has not been achieved.

The statutory moratorium is curtailing their ability to exercise their contractual rights and it is clear that the requirement of balancing competing interests sets a difficult threshold to meet in order to grant leave. On the one hand the extensive guidelines set down in *Re Atlantic Computer* ensures flexibility of approach in order to serve the 'purpose' of administration, however on the other hand, it is suggested that by trying to promote the rescue culture and overall purpose of administration, proprietary interests are easily subordinated in favour of salvaging the distressed company.

Undertaking a careful balancing act is not the most appropriate method for deciding whether leave should be granted or refused as such guidelines seem to disadvantage retention of title holders and

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[984] *Re TPS Investments (UK) Ltd (in administration); Tailby (as joint administrators of TPS Investments (UK) Ltd v Hutchinson Telecom FZCO* [2018] EWHC 360 (Ch).
[985] *ibid* as per His Honour Judge Stephen Davies at [76-82].
[986] *ibid* at [80].
[987] D Milman "Administration orders: the moratorium feature", *op cit* fn 905 at 73.
[988] S Wheeler "Insolvency Act 1986 and retention of title clauses", *op cit* fn 942 at 278.

other hire-purchase agreements. For example, one of the suggestions note that leave would be granted if significant loss would otherwise be suffered by a lessor. However, it is evident that if leave would not be granted then the retention of title holder will irrespectively incur losses. From a practical perspective, retention of title holders may not satisfy the requirement of significant loss but would nevertheless incur losses if leave to lift the moratorium would be refused. This again would be most evident for parties with retention of title clauses on goods of low sale value. The proposed guidelines seem to benefit the distressed company serving the purpose of administration, thus subrogating other competing interests including the retention of title holder.

Although it is appreciated that the proposed guidelines are merely suggestive in nature and the court has discretion to grant or refuse leave. It appears that it is impossible to satisfy all of the parties involved in administration as granting leave to exercise proprietary rights is likely to impede the purpose of administration. Both are contradictory as granting leave to lift the moratorium may reduce the pool of assets available to the distressed company, making the process of rehabilitation even more difficult to accomplish. As such a cyclical issue is inevitably apparent where balancing the interest of one interested party is detrimental to the other. As evidenced above, the courts have clearly struggled with the difficult interface between the statutory moratorium and the recovery expectations of third parties such as the retention of title holder or creditors. Furthermore, the courts have had further difficulty balancing the language of the statute and the precedents affirming the need to be flexible and inclusive in their approach. There has been a general reluctance by parliament to address these potential conflicts within the established law and as such the courts have been left to fend and iron out these complicated matters, inevitably with controversial results.[989] These difficult and problematic balancing requirements have caused significant uncertainty and a lack of clarity within the insolvency field, which ultimately hinders the operation of retention of title clauses in practice.

6.2.2 An illustrative example: Fashoff (UK) Ltd v Linton

A case which dealt with a supplier seeking the court's consent to repossess goods under a retention of title clause is *Fashoff (UK) Ltd v Linton.*[990] This case illustrates the difficulties imposed on retention of title holders seeking to repossess goods during the statutory moratorium in administration. In this case, two applications were made by Fashoff and Forall to exercise their retention of title clauses in respect of goods, which were sold to a company (Baron Jon Menswear Ltd) which had entered into

[989] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 106.
[990] *Fashoff (UK) Ltd v Linton* [2008] EWHC 537.

administration. Both Fashoff and Forall were seeking to gain permission from the court to enforce their retention of title clauses, a clause which allegedly formed part of their terms and conditions of the contract between the two applicants and Baron Jon Menswear Ltd. The applications were made under paragraph 43(3) of Schedule B1 of the Insolvency Act, seeking to repossess the goods under the hire purchase agreement, which were subsequently in the company's possession.

The factual background of this case was that Baron Jon Menswear, a clothing business had entered administration and an administrator (Linton) was appointed. Shortly after the appointment, the administrator arranged to sell the company's assets and stock, before receiving notice of any claims pertaining to retention of title. The stock sold by the administrator, included stock which Baron Jon Menswear had purchased from different suppliers. This stock was subject to retention of title clauses held by both applicants.

Both Fashoff and Forall's applications were considered and dealt with individually by the court. The factual background of both applications will now be provided, starting with the former. The facts for Fashoff's case background are as follows. From the onset, the administrator agreed that they would honour any claims pertaining to a valid retention of title clause, if they received evidence before a prescribed date. In order for Fashoff to pursue its claim for the goods which were subject to a retention of title clause, Fashoff had to evidence that Baron Jon had agreed to Fashoff's terms of incorporating a retention of title clause and explain how they could identify the unpaid goods from those goods which had already been paid for. With the intention of pursuing a claim under terms retaining title, it was imperative that the administrator was provided with evidence that the goods were supplied directly from Fashoff rather than a third party. The above questions were posed to Fashoff by the administrator in the form a letter. Despite numerous correspondence between the administrator's agent and Fashoff, Fashoff had failed to respond to the questions posed within the prescribed timeframe, instead the correspondence insisted for copies of the stock inventory. Further concerns were raised as Fashoff's terms were subject to Italian law under Condition 17. Under Italian law, in order to be valid, retention of title clauses must be registered. Fashoff had failed to provide a substantive reply to this query either. Subsequently, Fashoff sent a letter requesting consent from the administrator claiming a retention of title clause on a new set of terms and conditions were governed by English law. This letter was requesting the permission of the administrator to enforce security over Baron Jon's stock. Once again, Fashoff had failed to provide the administrator any evidence that the contractual terms relied upon were agreed by Baron Jon within the prescribed timeframe. The

prescribed date for honouring retention of title claims had since long passed.[991] Accordingly, the decision was taken to court.

Moving on to discuss Forall's claim, the facts are as follows, a confirmation order by Forall pursuant to agreement stated:
'the factor shall acquire the title of property to assigned debts with all the relevant accessories, liens, pledges and collaterals in general. Therefore, the supplier shall no longer dispose of the debts assigned to the factor.'[992]
Subsequently, Forall notified the administrator (Linton) that the goods were delivered under a retention of title claim and requested that any unsold goods be returned. The administrator's agent responded to the correspondence, requesting evidence that Baron Jon had been made aware of the terms of the contract, most specifically the retention of title clause and whether the unpaid goods could be identified. Forall had not demonstrated a way of differentiating the unpaid goods from goods which had been paid for and additionally failed to provide evidence that Forall's terms had been agreed by Baron Jon. For such reasons, the administrator was recommending that the claim should be rejected. Forall responded by disputing the rejection of the claim. Four months after Forall's claim had been rejected, Forall sent further correspondence to the administrator with a signed copy of an order between Forall and Baron Jon. Consequently, the decision was challenged and taken to court.

As such, the administrator sought to dispute the claim as Forall had failed to provide evidence that Baron Jon had agreed to the contractual terms at the time that the purchase agreement had been made and that the time frame in which any claims to retention of title clause would be honoured had subsequently long expired. For the former requirement, this follows the reasoning set out in *Re David Meek Plant Ltd*[993], which states that the claim must be considered at the date when the application was made. It was also argued by the respondents that in relation to Fashoff's claim, the retention of title clause had not been properly incorporated into the contract as the clauses had been printed as circulars and on the reverse of confirmation invoices. Additionally, in considering Forall's claim, it was contended that it remained questionable as to whether the terms had been properly incorporated as there was no order form signed by Baron Jon agreeing to Forall's terms. As such, this provided justification for the administrator rejecting consent to any claim pertaining to a retention of title.

[991] *ibid* at [41].
[992] *Fashoff (UK) Ltd v Linton, op cit* fn 990 at [44].
[993] *Re David Meek Plant Ltd, op cit* fn 922 at [686].

The court considered the guidance set by *Re Atlantic Computer* in deliberating whether the court should grant leave to exercise proprietary rights against the company in administration. A court is permitted to grant leave unless such actions would likely to impede the purpose of administration.[994] The guidance highlighted the need to balance the legitimate interests of the applicant against the legitimate needs of any other creditors of the company. In the process of conducting this balancing exercise, the court also emphasised the need to give weight or ensure great importance is given to proprietary rights.[995]

In considering Fashoff's case, the court concluded that the applicants had delayed making an application to the court and it was contended that such actions had prejudiced the creditors of the company. The period of delay amounted to around seven months for Fashoff's application. Accordingly, the administrator was unable to take action and make a distribution to creditors until such applications have been resolved. Additionally, it was held that the period of delay of seven months did not meet the requirement that an application should be made promptly. The court also argued that in relation to Fashoff's claim, no compelling evidence was provided which supported that the Baron Jon had consented to incorporating a retention of title clause within their contractual terms. Following this reasoning, HHJ Toulmin QC dismissed the Fashoff's application for leave.

Whilst deliberating Forall's claim, again the court emphasised and relied upon the period of delay, which was estimated at nearly eight months between Forall's notification of rejection and the subsequent application to the court. HHJ Toulmin QC stated that 'the delay in the context of purpose of the legislation was substantial and contrary to the requirement that any application should be made promptly.'[996] For such reasons, it was held that granting leave would impede the purpose of administration and that Forall did not have any standing to his claim purporting to retain title. Consequently, both applications were refused.

The above case is useful in illustrating the potential difficulties facing retention of title holders seeking to exercise their retention of title claims and repossess goods, during a moratorium. It is conclusive that parties must exercise their claims within the prescribed time frame set by the administrator. In this respect, the administrator will make it clear that any retention of title claims will be honoured for a reasonable period of time after the sale. However, if the timeframe has long since elapsed, then as

[994] *Fashoff (UK) Ltd v Linton, op cit* fn 990 at [94].
[995] *Re Atlantic Computer Systems plc, op cit* fn 977 as per Nicholls LJ at [542].
[996] *Fashoff (UK) Ltd v Linton, op cit* fn 990 at [110].

demonstrated by both Fashoff's and Forall's applications, the courts will not allow parties to exercise their retention of title claims, which are made after the course of the administration.

Additionally, as emphasised above by Fashoff's application, parties must provide evidence to the administrator or the court that the contractual terms, more specifically the retention of title clause have been agreed by both parties. Evidence of incorporating the retention of title clause is thus crucial in seeking to exercise contractual rights during a moratorium in administration. This proved to be fatal flaw in the case of Fashoff's application as there was no direct evidence that the contractual terms had been agreed by Baron Jon. Accordingly, it is imperative that parties are cooperative and most importantly, act in a timely manner. In addition to this, the administrator must be provided evidence that the goods have been supplied directly from the owner of the goods, rather than a third party, as well as be satisfied that the unpaid goods which are subject to a retention of title claim can be identified from goods which have already been paid for. In respect of the above case, the latter requirement was easily satisfied as each piece of clothing was branded with a unique tag and thus could be easily traced. However, providing an administrator with evidence of how goods subject to retention of title claims can be identified and thus distinguished from the remaining bulk of goods, may not be so easy for retention of title holders who are not in the clothing industry.

Accordingly, the case of *Fashoff (UK) Ltd v Linton* illustrates how holders of retention of title clauses are excessively burdened in the process of seeking to exercise their contractual rights during the moratorium in administration. One can argue that the moratorium in administration impedes the overall effectiveness of retention of title clauses on account of all the burdensome requirements imposed on the parties seeking to exercise their claims.

6.3 Potential recourse for wrongful refusal

It has been repeatedly emphasised by the court that Schedule B1 and the provisions of paragraph 43 and 44 merely impose a suspension on creditors' rights, as discussed in detail above. Consequently, the moratorium directly impacts the enforcement of such rights, rather than altering or destroying those rights altogether. Accordingly, where the administrator has decided to refuse leave to the creditor or owner of goods, this judgement may be reviewed in respect of whether the decision was found to be wrongful in any way. The decision may be reviewed in considering the subsequent impact of the refusal upon the creditor. As such, in certain circumstances, it may be possible to refute the

refusal of leave and bring a claim for compensation on the grounds of wrongful refusal.[997] Providing creditors the opportunity to challenge a moratorium, allows claimants to raise objections and indicate where their interests have been unfairly prejudiced.

An example of an administrator found to have been wrongful, is exemplified in the case of *Re Capitol Films Ltd*[998] (also known as *Rubin v Cobalt Pictures Ltd.*) In this case, the court was required to determine whether the decision of the administrator was appropriate in preventing a holder of a fixed charge from enforcing its security. The administrator was found to have behaved in an unreasonable manner by withholding consent to enforce security. The administrators conduct was found to be unreasonable and had failed to properly investigate a fixed charge claim and had failed to engage constructively with the secured creditors. The conduct of the administrators had been unreasonable to such an extent that the court responded by imposing an adverse cost order as well as an order which deprived the administrator of the right to recoup the costs as an expense of the administrator. Under paragraph 71 of Schedule B1, the administrators had to pay the costs of the application personally and on an indemnity basis. The conduct of the administrator was held to be unreasonable to such a degree that it justified the court to seek an order preventing the administrator from recovering any costs. As stated by Mr Richard Snowden QC 'in my judgement, this conduct of the application made by the Administrators was out of the norm and was unreasonable to a sufficiently high level to justify an award of costs on an indemnity basis.'[999] It follows that in order for the court to justify making an order, there needs to be a significant level of unreasonableness or inappropriate behaviour.

As illustrated above, in rare circumstances it may be possible to refute refusal of leave and bring an action for compensation. However, in order for the court to justify making such a decision, the conduct of the administrator's needs to be irrational and unreasonable to a high degree and the burden of proof is on the secured creditors to demonstrate that the administrators had disregarded the concerns of the secured creditors.[1000] In practical terms, administrators are supposed to serve the interests of creditors or owners of goods and as such it may prove difficult in evidencing that the administrators had subverted their duty to serve the interests of creditors during the process of administration. Applying the judgement of *Re Capitol Films Ltd,* from the perspective of the secured creditor or owner of goods, the combination of needing to prove that the administrator's conduct was sufficiently

[997] *Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd, op cit* fn 920.
[998] *Re Capitol Films Ltd* [2010] EWHC 3223 (Ch); [2011] B.P.I.R 334.
[999] *ibid* as per Mr. Richard Snowden QC at [97].
[1000] See further, *Re Capitol Films Ltd, op cit* fn 998 as per Mr. Richard Snowden QC at [98].

irrational and unreasonable as well as demonstrating that the administrators had disregarded the interests of secured creditors, imposes a very high threshold. This further illustrates why the statutory moratorium imposes a hindrance on the effectiveness of retention of title clauses. In order to be successful in refuting a refusal by the administrators, retention of title holders or those seeking to enforce their security rights must overcome a burdensome process. It is also apparent that the secured creditors or owners of goods will potentially be subjected to further cost expenditures and delays from enforcing their security rights in waiting for the court to determine whether it was appropriate to prevent parties from enforcing their security over the assets of the company.

6.4 Conclusion

The statutory moratorium provides an important prohibition of proceedings, however it is submitted that it also imposes significant limitations on the enforcement of security and other proprietary rights against the company. This issue is exacerbated further by definitional issues as there is still a degree of ambiguity surrounding terminology used by the Insolvency Act 1986. Retention of title clauses are hindered unnecessarily by virtue of the Act providing a separate definition for retention of title clauses and grouping such clauses under the category of hire-purchase arrangements. The definition prescribed by section 251 has been criticised for its lack of clarity and overlapping nature with other provisions of the Act.[1001] To this day, it is still unknown as to why retention of title clauses are segregated from the category of conditional sale agreements. Especially, considering it is incredibly difficult to conjure an example of a retention of title clause which does not fall within the definition of a conditional sale agreement. Clearly, the legislation fails to understand and grapple with the nature of a retention of title clause and has unnecessarily complicated matters and produced significant definitional uncertainty. The definitional issues can be exemplified by the uncertainty surrounding the term 'taking steps' to enforce claims as despite rigorous judicial pronouncement, ambiguity still persists. Clearly, retention of title holders' actions are restricted to having to obtain permission from the court or administrator to proceed with their claim to repossess goods supplied or risk breaching the provisions under paragraph 43(4). Paragraph 43(3) of Schedule B1 prevents a retention of title holder from taking steps to repossess goods in the possession of the company. From the outset this clearly weakens the functional objective of a retention of title clause in the context of a company entering into administration. Despite the conceptual objective of a retention of title clause in allowing

[1001] See generally, R Goode, *Principles of Corporate Insolvency Law, op cit* fn 61 at 433, para 11-63.

a seller to retrieve goods in the event of a non-paying buyer, clearly in practice, claimants are impeded from doing so without permission from the court/ administrator.

Additionally, the statutory moratorium disrupts the notion of collectivism which retention of title holders are a party to and thus, any disruption causes significant issues for parties seeking to realise assets of company in an orderly fashion. The tendency of the courts is to resolve any difficult case by promoting the collective good,[1002] which has inevitably impacted upon parties seeking to enforce their proprietary rights against the distressed company. The courts have clearly struggled with the two fundamental dichotomies within this field of insolvency law; the first pertaining to the interface between the statutory moratorium and the recovery expectations of the third parties; and the final dichotomy refers to the difficulty of balancing the language of the provisions of the Insolvency Act and the precedents outlining the need for the courts to be inclusive in their approach. The resulting conclusion is that the law has dealt with this minefield of difficult conflicts in a way which has caused significant uncertainty for those parties seeking to realise their claims including retention of title holders. Over twenty year ago, the state of insolvency law had been described by Finch as:
'A pragmatic tradition manifested itself in piecemeal development of the law; reactive solutions were adopted rather than coherent frameworks of principles; and legal provisions were scattered throughout a plurality of statutes, statutory instruments and judicial decisions.'[1003] Umfreville advocates that such a statement accurately reflects the status of the current insolvency framework[1004]- a statement wholly supported by this author.

Furthermore, the lack of clarity imposed by the courts significantly impedes the functionality of suppliers using retention of title clauses in practice. The moratorium temporarily freezes the rights of the parties, which again hinders the functional objective of a retention of title clause. Essentially, the statutory moratorium imposes a barrier to the enforcement of these title retention agreements. Parties will not be able to reclaim possession of their goods until consent or permission is obtained. Arguably, this weakens the commercial utility of the retention of title clause as the protection offered will be second-rate to parties obtaining consent from the administrator or courts. The functional use of retention of title claims are severely impeded by the need to ascertain permission by an external body to enforce their claims. In addition, following the implications of *Jet Star Retail,* retention of title clause must exercise the rights that they hold under their claims by withdrawing the authority for

[1002] D Milman "Administration orders: the moratorium feature", *op cit* fn 905 at 75.
[1003] V Finch, "The Measures of Insolvency Law" (1997) 17(2) *Oxford Journal of Legal Studies,* 227-251, at 228.
[1004] C Umfreville "Pre-packed administrations and company voluntary arrangements: the case for a holistic approach to reform" (2019) 30(11) *International Company and Commercial Law Review,* 581-603, at 602.

buyers to sell and dispose of the goods. Thus, adding to the burden imposed on retention of title claimants during the administration proceedings. The rescue culture enshrined by the statutory moratorium tends to be more benevolent to the distressed company, whereas retention of title claimants and other creditors seeking to enforce their contractual rights are subjected to the court's stringent approach and the timely delays stemmed from the administration process.

The statutory moratorium imposes an increasingly difficult threshold for retention of title claimants to meet when making an order to grant leave. When demanding goods, retention of title claimants will have to clearly identify the goods and location in as much detail as possible to facilitate the role of the administrator during the proceedings. In practical terms, retention of title claimants must work diligently to compile detailed inventory of the claimed assets and arrange appointments to identify those assets. Evidently, the burden of identifying goods and establishing title falls solely on the seller of the goods claiming to retain title. The claim for supplied goods under a retention of title clause can be easily defeated by an administrator holding that there is insufficient or inadequate evidence proving the existence of such a clause. The role of the courts in facilitating arrangements of lifting the moratorium, does not often culminate in the successful recovery of goods and often exposes those parties to further unnecessary litigation. As emphasised by Milman, 'the hostile nature of administration in the sense of its impact on outside stakeholders can also generate costly contested litigation.'[1005] Accordingly, this substantially increases the administrative burden on those seeking to enforce their contractual agreements and prove existence of their retention of title claims. Furthermore, it cannot be disputed that the statutory moratorium introduces significant hindrances for those seeking to rely on their retention of title provisions, most notably by exposing those claimants to considerable delays and disruptions. The duration of the moratorium which can be extended can also impact the commercial value of goods which could lower during the moratorium period and can weaken the bargaining position of retention of title claimants by preventing suppliers from seeking damages for conversion. The above discussion has illustrated the many potential difficulties facing retention of title holders seeking to exercise their title retention claims and repossess goods, during a moratorium.

It is evident for the reasons discussed in this chapter that the statutory moratorium as provided by Schedule B1 fails to balance the competing interests between on the one hand ensuring creditor protection, and on the other affording distressed companies a period of relief for the possibility of

[1005] D Milman "Moratoria on enforcement rights: revisiting corporate rescue", *op cit* fn 903 at 95.

rescue and rehabilitation. Less affinity is shown for rights which are created by security or perform the function of security.

CHAPTER 7: SUGGESTED PROPOSALS FOR REFORM

7. Introduction

A primary aim of this research enquiry was to illustrate notable issues which limit the effectiveness of retention of title clauses. Having identified the main problems restricting retention of title clauses from fulfilling their main functional objectives of mitigating sellers' risk, the research will now suggest potential solutions to the problems raised. Having documented the main issues hindering retention of title clauses throughout this thesis, the discussion will now turn to suggesting proposals for a reanalysis of the legal position pertaining to retention of title clauses. It is hoped that the following section on potential solutions can demonstrate how this research can be developed further in the future.

As is the case with any proposals for reform, the breadth of possible directions to take is vast in scope. Accordingly, it is not the author's intention to examine all possible recourses for rectifying the minefield of legal issues associated with the way the clauses are treated under English law. As such, the following discussion will examine three possible suggestions as to how the law can respond to the wide-ranging ramifications of the current unsatisfactory position under English law. It is felt that the following three proposals tackle the most significant issues pertaining to the current legal position of retention of title clauses and as such, warranted detailed consideration. The suggestions are an amalgamation of both short-term solutions and long-term reform initiatives. It is worth noting that the following suggestions are not the author's original creation and thus, the upcoming discussion will build upon existing material/ arguments and due recognition of any proposed reform initiatives will be given to the appropriate author. The first suggestion proposes a revaluation of the passing of title, whereby title passes immediately before the goods are destroyed.[1006] The second suggestion calls for more broader reform initiatives by amending the Sale of Goods Act 1979.[1007] The final suggestion

[1006] This suggestion was proposed by Tettenborn in A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?" (2016) 1 *Lloyd's Maritime and Commercial Law Quarterly,* 24-28. Similar suggestions advocating for the 'nanosecond' argument can be found in D Saidov "Sales law post-Res Cogitans", *op cit* fn 101; and the work of K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4.

[1007] A version of this argument is made by Gullifer who advocates for the redrafting of the Sale of Goods Act to ensure a wider application by including all of the circumstances which goods are supplied to businesses in the modern context, including the inclusion of the new *sui generis* contracts, supply of services and digital content. See further, L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?" *op cit* fn 60. Additionally, Saidov proposes to change the Sale of Goods Act to specially reform price action and to

discusses the feasibility of the recharacterization of a retention of title clause as a registrable charge.[1008] Due to the timing of this thesis, the author acknowledges the difficulties of reforming this area of law in an imminent manner, as evidently Parliament is presently occupied by Covid-19 and Brexit repercussions, however it is hoped that the law will be reformed sometime in the near future to address the most problematic issues identified in this thesis pertaining to retention of title clauses.

7.1 Addressing *Bunkers* first and foremost

Since the legal and commercial implications produced by the *Bunkers* case have been so profound and detrimental to the overall functionality of retention of title clauses, it is reasonable to provide suggestions on how to address the issues raised in this case first, before providing further recommendations and proposals for reform. It is by no means suggested that providing solutions to the *Bunkers* case will solve all the issues which detrimentally hinder the utility and effectiveness of retention of title discussed throughout the course of this thesis. However, addressing the issues of *Bunkers* directly will hopefully provide the starting impetus for rectifying the unsatisfactory way the courts have dealt with retention of title clause thus far.

7.1.1 A revaluation of the passing of title

As the decision in *Bunkers* has led to such uncertainty with regards to the utility of retention of title clauses within the commercial market, a reanalysis of the legal position must be put forward. The first solution supported by Tettenborn is a reanalysis of the law of property, more specifically the transfer of ownership.[1009] One argument raised at the start of the *Bunkers* litigation but was unfortunately rejected by Males J at first instance, dealt with the transfer of title in suggesting that title to the goods passed for or in a nanosecond before the consumption of the bunkers.[1010] It is contended that this

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modernise the Act. See further D Saidov "Sales law post-Res Cogitans", *op cit* fn 101. Calls for reforming the law of sale of goods have been prevalent for quite some time, see for example, M Bridge "What is to be done about sale of goods?" (2003) 199 *Law Quarterly Review,* 173-177.

[1008] The third suggestion has been widely proposed and is mentioned in the following selective sources: L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60. See also, A McKnight "Reforming the English law of secured transactions in personal property", *op cit* fn 692 at 553-567. See also reform consultation papers, The Law Commission, *Registration of Security Interests: Company Charges and Property other than Land,* Consultation Paper no 164 (2002) Available at http://www.lawcom.gov.uk/app/uploads/2015/03/cp164_Company_Security_Interests_Consultation.pdf Accessed 02/09/20.

[1009] A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?", *op cit* fn 865.

[1010] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 at [14].

particular point, of whether title could pass immediately before the destruction of the goods and its implications for retention of title clauses, ought to have given more detailed consideration, rather than Males J refusing the permission to appeal on that particular ground.[1011] Thus, the first contention is that the clause in the case implicitly implied that title to the goods would pass immediately before the consumption of the goods or at the exact time the bunkers were consumed. This construction of the clause would have changed the decision of the case significantly as clearly there would have been a distinct agreement to deliver both possession and title to the goods.[1012] However, Males J and the Court of Appeal gave short shrift to this argument and rejected it hastily on the basis that this would contradict the express provision of the retention of title pending payment following 60 days.[1013] Accordingly, the intended purpose of this section is to highlight some of the main criticisms concerning the transfer of ownership and the interpretation of the courts in *Bunkers,* before suggesting a possible reanalysis of the legal position and its associated implications for retention of title clauses.

At first instance, Males J relied upon the fact that no title could pass in the situation where the goods ceased to exist, and it was this contention that was significant in reaching his decision, which was later agreed by the Court of Appeal. Nevertheless, this interpretation has been subject to extensive criticism on the grounds that if title could not pass in non-existing goods on the above rationale, neither would it be plausible for one to retain title.[1014] Accordingly, this debunks the contention that the express provision of the retention of title clause contradicts with the implied term. As such, the courts' strict interpretation of the contract as retaining title to non-existent goods is less plausible than originally thought. As expressed by Tettenborn 'the idea that any reasonable businessman (whose view, of course, is vital to the questions of in the interpretations of contracts) would read it as reserving title to the non-existent goods incapable of ownership by anybody is, to say the least, curious.'[1015] The above rationale behind the categorisation of the contract as *sui generis* and not a contract of sale, a rationale relied upon by all of courts in the *Bunkers* litigation is subsequently less than convincing.

It is submitted that the decision to categorise the contract as *sui generis* and not one of sale and thus, disapplying the scope of the Sale of Goods Act is respectfully the wrong interpretation in the context of the *Bunkers* case. As noted in a previous chapter, completely changing the nature of the contract

[1011] See *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 at [14] which notes different ways OWB suggested that it could recover the price of the bunkers under the scope of the Sale of Goods Act. All points raised were refused permission to appeal by Males J.
[1012] A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?", *op cit* fn 865 at 26.
[1013] *PST Energy 7 Shipping LLC, Product Shipping and Trading S.A v O.W. Bunker Malta Limited, ING Bank N.V, op cit* fn 847 as per Males J at [67].
[1014] A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?", *op cit* fn 865 at 26.
[1015] *ibid* at 27.

in *Bunkers* as *sui generis* has detrimental commercial and legal implications for retention of title clauses.[1016] The court interpreted the contract between OWB and the Owners as unequivocally providing that no property in the goods would pass for the duration of the credit period which amounted to 60 days. Furthermore, the court argued that price was an indivisible consideration for all the bunkers involved and that the characterisation of the contract could not be dictated by the transfer of title in any remaining bunkers, due to the agreed express provision allowing the goods to be consumed.[1017] On this contention, it is reasonable to assume that since there was no possibility of title ever passing, then this would also correspond to the argument that there could be no contract of sale. However, it is argued that this was not the case in *Bunkers* as despite the provision allowing the consumption of the bunkers, there was the possibility of title passing for any remaining bunkers and parties did intend for title to pass in any remaining unconsumed/ unpaid bunkers. Accordingly, the proper construction of the express provision (allowing the consumption of the bunkers for propulsion purposes), should be construed as not one which calls for the situation where all the bunkers must be consumed but rather, that there might be the possibility of the bunkers being consumed.[1018] As such, it is respectfully submitted that the preceding courts took the wrong approach with the rigid construction of the clause as providing that all bunkers must be consumed, and that this was envisaged by the parties. In doing so, the courts were mistakenly committed to categorising the contract as *sui generis.* This is supported by Yap who states, 'the Supreme Court's emphasis on the term allowing consumption before payment as a key factor in the characterisation of the contract was arguably misplaced, since that term was only intended to regulate what the Owners could do with the goods before payment, rather than to change the whole character of the contract from sale to a *sui generis* contract.'[1019] Arguably, the proper analysis should be that the parties did in fact intend that title to the goods would pass on a conditional basis for any goods remaining unconsumed and unpaid for.[1020] Applying this to the contextual facts of *Bunkers,* it is possible to state that there was the possibility that some if not most of the bunkers would be consumed for propulsion purposes, however on the same basis it was also possible to argue that some remaining bunkers would be left unconsumed and unpaid for. Accordingly, the clause should have been interpreted as not one which exclusively permits that all bunkers would be destroyed by consumption as this clearly negates the possibility that there

[1016] See section 5.3.3.
[1017] H Moore 'Unconventional "Sales"'(2016) 75(3) *The Cambridge Law Journal,* 465-468, at 466.
[1018] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 at [12] which states that the arbitrators were invited to treat the assumed facts that all the bunkers were used within the credit period of 60 days. The Supreme Court was told the actual position that at most, part of the bunkers were used, with any remainder being used at a later point.
[1019] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 278.
[1020] In this respect the condition would relate to the fact that the goods had not been consumed previously for propulsion purposes.

would be remaining bunkers available at the end of the 60-day credit period. As such, the claim supported by Males J that there was no expectation to transfer to title to all the bunkers supplied is refuted. Clearly, the parties had expected that title would transfer for all the bunkers supplied, including those consumed and those bunkers which remained unpaid and not extracted.

The benefit of this interpretation lies in the fact that it would not necessitate a complete change of nature of the contract and would not impact the utility of the retention of title clause. To support this claim, had there been any remaining unpaid bunkers at the end of the 60 days credit period, the retention of title clause would have operated in the usual way, in which case the supplier OWB would have retained title. As such, it is suggested that the parties to the contract did foresee that title to the goods would pass on a conditional basis (of allowing the consumption of the goods) and intended for the contract to be one of sale. This is well within the scope of the Sale of Goods Act as the Act provides under s1(3) that a contract may in fact be either absolute or conditional.[1021] In this interpretation, the transfer of risk takes place before the passing of title. The reanalysis of the law of property recommends that title to the goods passes immediately before such goods are destroyed, consumed, or even resold.[1022] This proposition is entirely plausible and, in the instance where the goods have been consumed or destroyed, after the passing of risk but before title has passed, the price remains payable. The price remains payable irrespective of the fact that it is not possible to transfer title in goods which no longer exist.[1023] Furthermore, a contract under which the risk has transferred to the buyer, still remains a contract of sale. To that extent, where the risk is on the buyer, many contracts of sale are in fact conditional contracts. This is even the case in the instances where the seller no longer has goods or the seller has a contract purporting title to the extant goods, to deliver to the buyer.[1024] Thus, the conditional sale point evidently has merit and the decision and rationale of the court is contestable.

Thus, the approach that the courts should have adopted in *Bunkers* was to recognise that the seller's obligation to transfer title is in fact conditional on the continued existence of the goods, which does not exclude such contracts from being categorised as contracts for the sale of goods. It is argued that the categorisation of sale was not inconsistent with the express provisions and retention of title clause

[1021] See Section 1(3) of the Sale of Goods Act 1979.
[1022] This argument has also been described as 'scintilla temporis' or the 'nanosecond' argument where title to the goods intends to pass the moment/ nanosecond before the destruction of the goods.
[1023] See A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?", *op cit* fn 865 at 28, in which he supports his submission with the following cases: *Ross T Smyth v Bailey* [1940] 3 All ER 60; *Manbre Saccharine Co Ltd v Corn Products Ltd* [1919] 1 KB 198.
[1024] M Bridge "The UK Supreme Court decision in The Res Cogitans and the cardinal role of property in sales law", *op cit* fn 892 at 353.

contained within the contract in *Bunkers.* The interpretation of passing title immediately before the destruction of the goods, would have led to the contract being categorised as a contract for sales as a matter of law. Saidov is in concurrence with this interpretation as it would be more in line with not only commercial sense, but also the bunkers industry which previously construed analogous bunkers contracts as sales contracts and would ultimately reflect the parties' conceptualisation of their contract.[1025] Interpreting the parties' intention with regards to the passage of title in a way which leads to the categorisation of the contract as one of sale, would negate the adverse commercial and legal consequences listed in the previous chapter. In addition, had title/ownership passed immediately before the consumption of the bunkers and the contract was categorised as a sales contract, the interpretation would have produced the same result for the case, the result of the Owners being liable to pay the price. In conclusion, interpreting the passing of title immediately before the destruction of the goods thus has two fundamental benefits: firstly it produces exactly the same outcome of the case, which allows a degree of consistency with the judicial outcome and secondly, it avoids the negative implications arising from the contract not being categorised as one of sale. As aforementioned, the appeal on this interpretation was rejected by Males J at first instance, it is thus extremely disappointing that the Supreme Court did not have the opportunity to address this issue directly.[1026]

7.1.2 Implications for retention of title clauses

Reinstating the categorisation of the contract as one of sale, rather than *sui generis,* has the added benefit of not making the retention of title clause obsolete in its application. By providing that the passing of title to the goods happens immediately before the destruction of the goods, this means that the retention of title clause is not restricted in its remit. Furthermore, this contention addresses the issue of the retention of title clause only operating under the limited circumstances of being left with any remaining unpaid bunkers, which have yet to be consumed. Whilst it is acknowledged that this interpretation does not provide the supplier with an abundance of proprietorial security, at least this interpretation promotes commercial sense[1027] and is more likely to reflect the intention of the parties, a fundamental aspect for contractual interpretation. Accordingly, categorising the contract as one of sale would address the issue of such contracts falling outside of the remit of the Sale of Goods

[1025] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 6.
[1026] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [14].
[1027] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 261.

Act. Accordingly, the Sale of Goods Act would no longer be undermined by such contracts falling outside of the scope of the Act.

The proposed solution outlined above focuses mainly on contractual interpretation, however it is possible that the solution could also emerge from an implied term, purporting that title to the goods would pass either immediately before or at the time of the destruction of the goods. However, it is submitted that using the form of an implied term propels the argument that the *sui generis* contract are effective in terms of business efficacy as can be evidenced by case law.[1028] As discussed in a previous chapter[1029], the categorisation of the contract as *sui generis* has detrimental legal and commercial implications on the functionality of retention of title clauses. As such, the focus of the proposed recommendation suggesting the passage of title immediately before the destruction of goods, derives from contractual interpretation rather than from an implied term.

Another benefit of title passing immediately before the destruction of the goods, is the fact that it not only applies to situations involving retention of title clauses and the possibility of the goods being destroyed, but it also extends to the situations where goods have been resold. As such, title can pass immediately before the goods are resold. This has the additional benefit of reflecting the intention of the parties in a wide range of situations involving goods supplied subject to a retention of title clause. It has been suggested by Gullifer that the interpretation of title passing a nanosecond before the destruction/ resale of the goods, is preferable to the agency construction adopted in the case of *Wilson v Holt.*[1030] As noted in a previous chapter, the agency construction is unlikely to reflect the intention of the parties, and once again produces uncommercial implications. As such, this revaluation addresses two fundamental issues arising out of contentious jurisprudence: the agency construction arising out of *Wilson v Holt* and the categorisation of a contract of supply as *sui generis* in lieu of a sales contract deriving from the *Bunkers* case. In the situation whereby the parties intend for their relationship to be construed as an agency relationship, this should be adequately indicated in the contract itself by distinctly outlining the obligations and duties arising out of an agency type relationship.[1031]

Rather than taking a passive approach and waiting for further judicial clarification which is essentially halted until another similar dispute reaches the courts, parties seeking to rely on retention of title

[1028] See *The Moorcock* (1889) 14 P.D 64 CA; *Shirlaw v Southern Foundries Ltd* [1939] 2 K.B. 206 CA.
[1029] Revert back to section 5.3.3.
[1030] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 261.
[1031] *ibid.*

clause must be proactive. One proactive measure which parties can adopt is subsequently adapting their contractual agreements to ensure that they fall within the familiar scope of the sales law by including an express provision which reflects the intention of the parties. In practice, the revaluation of the passing of title could be achieved by incorporating an express provision in sales agreements stating that title passes immediately before or on the destruction of the goods. This in turn facilitates the interpretation of the contract for any future courts, where it will hopefully be clear that this was in fact intended by the parties involved and that provisions of its kind are not to be construed as an agency relationship nor resulting in a *sui generis* contract, in lieu of a contract of sale. Following the aftermath of *Bunkers,* any parties in analogous situations must ensure that their written contracts expressly provide that title passes on either the payment of price or immediately before consumption. By doing so, the contracts will fall under the familiar remit of the Sale of Goods Act and this will be clear from the onset. Evidently, including an express provision within any future contract is vital since the implication of terms was hastily rejected in *Bunkers.*[1032] Communicating the parties' intention clearly from the onset by way of an express provision, will hopefully avoid any doubt or confusion further down the line of proceedings. An express provision will make it abundantly clear that the parties do intend for title to pass immediately or on the destruction of the goods. An express provision of this kind would merely be a manifestation of contractual freedom given to sellers and buyers by virtue of the Sale of Goods provisions, most notably section 17 which stipulates that property can pass when intended to pass. Accordingly, in this instance the express provision will state that title passes immediately before or on the destruction of the goods.

Thus, the first recommendation advocates for a revaluation of the passing of title, whereby title passes immediately (a nanosecond) before the goods are destroyed. The caveat to this recommendation is, of course, the rejection by Males J at first instance, which has essentially denied the Supreme Court the possibility of addressing this issue directly. For such reasons, alternative suggestions must be proposed.

7.2 Reforming or redrafting the Sale of Goods Act

The non-applicability of the Sale of Goods Act is a serious problem because sales on retention of title terms are ubiquitous in the commercial market. Even more common are the instances where goods are supplied with retention of title terms, which are nevertheless intended to be used quickly and well

[1032] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 as per Lord Mance at [28].

in advance of payment.[1033] As such, the decision of the Supreme Court in *Bunkers* has a profound impact on the law of sale of goods, which disrupted the common understanding of the applicability of contracts on retention of title terms within the scope of the Sale of Goods Act. The decision reached in *Bunkers* undermines the remit of the Sale of Goods Act by reducing the applicable transactions. A significant number of contracts, such as contracts on retention of title terms and contracts on credit, which used to be governed under the Sale of Goods Act, are potentially subsequently categorised as *sui generis* contracts. Clearly, the decision introduces uncertainty into this particular category of contracts- sales on credit using retention of title terms, contracts which are notoriously common and commercially useful.[1034] As emphasised by Low and Loi 'it is no longer clear which provisions of the SGA would continue to apply to sales on credit on ROT terms by way of analogy and which will not.'[1035] The theoretical basis of many of the customary retention of title clauses within the sales of goods law is now less than certain on account of the controversial decision reached in *Bunkers.* This area of law is clearly riddled with significant uncertainty which ultimately hinders the functionality of retention of title clauses. If it is unclear as to which sale of goods provisions apply to sales on credit on retention of title terms, sellers may be deterred from relying on retention of title terms, preferring to opt for alternative mechanisms which afford parties a degree of certainty instead.

It can be argued that the Sale of Goods Act warrants reform to reflect the modern conditions in which it operates.[1036] An entire redraft of the Act could be facilitated to ensure that the Act encompasses a much broader remit of circumstances including: proprietary rights, sales of goods, the new elusive *sui generis* contracts and all of the circumstances in which goods are supplied to businesses. By doing so, the scope of the Act would be considerably wider and would reflect the way goods are sold and supplied in the modern business context. Thus, amending the Sale of Goods Act to reflect the modern business context would subsequently release the Act from its 19th century confines, of which many of its core provisions take the default form as enacted originally back in 1893. For example, the definition given to 'goods' by section 61 which states 'includes all personal chattels other than things in action and money[1037]' is evidently dated and obscure. Amending provisions will thus ensure that the Act remains a progressive piece of legislation.

[1033] A Tettenborn "Of Bunkers and Retention of Title: When is a Sale Not a Sale?", *op cit* fn 865 at 26.
[1034] K Low and K Loi "Bunkers in Wonderland: A Tale of How the Growth of Romalpa Clauses Shrank the English Law of Sales", *op cit* fn 4 at 253.
[1035] *ibid.*
[1036] A similar argument is made by Bridge who advocated for an overhaul of the law of sales back in 2003. See M Bridge "What is to be done about sale of goods?" (2003) 199 *Law Quarterly Review,* 173-177, at 174.
[1037] Section 61 Sale of Goods Act 1979.

However, the difficulties of employing consistent terminology to cover all these different contracts is acknowledged and careful consideration to terminology would have to be exercised. The main implications of terminological uncertainty have been discussed at length in a previous chapter[1038], but any amendments would have the notoriously difficult task of ensuring a degree of consistency and providing sufficient clarity within the provisions of the Act. By amending the scope of the Act, it will provide a convenient opportunity to dispel the archaic disparity between the terms of title, ownership, and property through providing adequate clarification. Providing clarification would be beneficial in ensuring consistency and clarity of meaning. The current implications of the Act not defining such key terms is that the law develops gradually and on a piecemeal basis, which leads to significant inconsistencies. Including further clarification within the Act will thus bring coherence to this area of law and limit some of the existing difficulties with retention of title clauses. Most notably, one suggestion would be to support Battersby and Preston's recommendation of expanding the phrase transfer of property to infer a comprehensive explanation of what it entails.[1039] Expanding the concept of property would rectify the criticisms of section 61 which currently asserts a limited meaning to property. Adopting this expanded approach to the concept of property would not only convey the appropriate meaning but would also reduce the possibility of producing variances and inconsistencies. The above suggestion is limited to providing clarification rather than advocating for specific definitions to be included within the scope of the reformed Act. This is intentionally done to ensure that the delicate balance between certainty and flexibility of the Act can be maintained. A balance can be struck between ensuring a sufficient amount of flexibility as to allow for adjustment to the ever-developing market on the one hand, and providing parties a high level of clarity and certainty so that they fully understand what is required of them and thus can plan intelligently for any eventuality. Developing suitable and all-encompassing definitions would be highly technical and a difficult feat to accomplish and thus providing clarification to the Sale of Goods Act would be the most appropriate course of action. On a general note, this may be the opportune time to reform the law of sales, especially since consumer transactions have been extracted from the Act.[1040] Accordingly, this may provide the impetus for change to move away from the state of the market of the late 19th century and propel the law to reflect the modern business market of the 21st century.[1041]

[1038] See section 3.6 for further discussion.
[1039] G Battersby and A Preston "The Concepts of Property Title and Owner used in the Sales of Goods Act 1893", *op cit* fn 384 at 270.
[1040] See Consumer Rights Act 2015.
[1041] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 263.

However, it is recognised that the likelihood of completely modernising the Sale of Goods Act by introducing major reform or revisions to the law of sale remains an unlikely prospect.[1042] The feat of a complete overhaul of the law of sales cannot be underestimated. As epitomised by Bridge, 'the chances of modernising the Sale of Goods Act are slim: arguments that the law should be reformed to accord with superior legal aesthetics have no traction in the UK.'[1043] For a new statute to be drafted and enacted, this would require a substantial amount of work, which may raise the question, whether a complete overhaul of the law of sales is necessitated or would amendments and revisions be sufficient?

7.2.1 Inclusion of new provisions

A simple revision to the Sale of Goods Act could potentially provide the solution to the issues brought to the forefront in *Bunkers.* Bridge has suggested the inclusion of the following provision in the Sale of Goods Act:

'A contract for the supply of goods is not prevented from being a contract of sale for the purposes of this Act by reason only of a permission given by the supplier for the goods or some of them to be used, consumed or disposed of before the property in them passes to the receiver of the goods upon payment.'[1044]

This would be a relatively simple revision and could be incorporated directly into section 2 of the Sale of Goods Act which deals with contracts of sale. Such a simple addition would bypass the detrimental implications of categorising supply contracts as not contract of sales. If any analogous situations to *Bunkers* arise, the parties involved would not be subjected to their contract being characterised as *sui generis* but rather the clauses would be construed as contracts of sale, a desired outcome for many of those seeking to rely on retention of title clauses.

7.2.2 Further clarification for section 49

Although it can be argued that the availability of bringing an action for the price has been settled to some degree by the Supreme Court in obiter, it is contended that further clarification is needed by amending section 49 of the Sale of Goods Act 1979. To promote greater legal certainty and

[1042]Bridge concedes that such prospects are merely a 'pipe dream' in M Bridge "What is to be done about sale of goods?", *op cit* fn 1036 at 177.
[1043] M Bridge "The UK Supreme Court decision in The Res Cogitans and the cardinal role of property in sales law" *op cit* fn 892 at 364.
[1044] *ibid.*

predictability, which at present is arguably lacking in this area of law, further clarification is required outlining the precise circumstances in which an action for the price can be brought. It is evident that merely relying on the passive development of case law is not sufficient as despite the efforts of the Supreme Court to provide some situations where the price can be claimed, the state of play it is still far from clear.[1045] In addition, despite the Supreme Court having the prime opportunity to clarify the excessive ambiguity of when the price can be recoverable outside section 49, such a vital decision was left 'for determination on some future occasion.'[1046] Clearly, sellers are lacking a comprehensive framework which provides all of the circumstances where sellers are allowed to claim the price. At present, the implication of the overtly cautious approach taken by the Supreme Court in *Bunkers,* means that sellers may still find themselves unsure if they are able or unable to claim for the price.[1047] In light of this uncertainty, many sellers wishing to rely on retention of title terms will most likely have to specify a day certain, the consequences of such actions has been discussed in a previous chapter.[1048] Irrespective of the possibility of reliance on section 49(2), the basis for claiming an action for the price of the goods remains unsatisfactory and thus warrants legislative reform in order to develop a systematic framework.[1049] It is thus suggested that section 49 needs to be updated to provide sellers with some much-needed clarity and coherence.

One of the proposed amendments to section 49(1) revolves around the importance of delivery. Accordingly, one suggestion is that section 49(1) should be revised to provide that a seller can claim the price once payment is due and the goods have been delivered to the buyer. This is irrespective of whether title to the goods has passed to the buyer or not. This is beneficial as it effectively strikes a fair balance between the interests of both sellers and buyers since the buyer has notably received possession of the goods and thus, should pay the price for the goods.[1050] Additionally, the buyer's position is sufficiently protected as the goods would be in the buyer's possession before having to pay the payment price and concurrently, the buyer is able to deal with the goods as planned.[1051] A fair balance is also struck when the seller essentially gives up the possession of the goods and hence, is not afforded a stronger position than the buyer to deal with the goods. Linking the claim for price with delivery is thus an appealing solution. In addition, this suggestion lends itself well with section 28 of the Sale of Goods Act which provides that payment and delivery are concurrent conditions:

[1045] See J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 275.
[1046] *PST Energy 7 Shipping LLC v O W Bunker Malta Limited, op cit* fn 112 at [57].
[1047] H Moore "Unconventional "Sales"',*op cit* fn 1017 at 468.
[1048] See section 5.2.4 for further discussion.
[1049] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 8.
[1050] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 275.
[1051] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 9.

'Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.'[1052]

Accordingly, this supports the argument that a claim for the price of the goods should be available upon delivery since section 28 connects price with delivery rather than the passing of title.[1053] Of course, an alternative suggestion would be to consider risk, which generally passes with title[1054], however out of the two suggestions: delivery and risk, delivery is the most viable solution. The main rationale behind promoting delivery as the preferred solution is that the passage of risk can be uncertain as it is essentially very difficult to pinpoint the exact moment when title passes. Hence, it can be particularly problematic to determine the passage of risk. In contrast to this, as epitomised by Saidov, 'delivery is a more clearly defined event, promoting certainty, finality.'[1055] Arguably, delivery is more determinable than risk due to the fact that delivery has the notable advantage of being a visible event, where it will be clear once the goods have been delivered and are in the possession of the buyer.[1056] Thus, out of the two alternatives, delivery is the preferred solution. However, despite the argument that delivery is a more readily identifiable event, it is acknowledged that for such an amendment to be effective, it will be vitally important to clarify what precisely constitutes delivery, which may require statutory clarification. By providing statutory clarification on what constitutes delivery, one would hope that this limits the circumstances of where it is unclear as to whether delivery has occurred, thus providing greater clarity for both sellers and buyers alike. Including a robust definition of delivery[1057] will promote finality to parties, in which case the statutory clarification will ensure that delivery is in most circumstances, an easily identifiable event.

It is submitted that amending the Sale of Goods Act in a way which connects the action for price with delivery would enable a more coherent and systematic framework within sales law. In addition, amending or incorporating the above suggestions within the contract of sales definition or by providing further clarification to many of the definitions laid out in section 61 would also bring some much-needed certainty within the law of sales. The likelihood of amending and revising the Sale of

[1052] Section 28 of the Sale of Goods Act 1979.
[1053] J Yap "Predictability, certainty and party autonomy in the sale and supply of goods", *op cit* fn 734 at 275.
[1054] Section 20(1) of the Sale of Goods Act 1979.
[1055] D Saidov "Sales law post-Res Cogitans", *op cit* fn 101 at 9.
[1056] It is noted that there are examples where linking the claim for price with delivery may not be appropriate such as with CIF contracts, where risk passes before delivery.
[1057] It is acknowledged that the Sale of Goods Act provides in section 61 that delivery 'means voluntary transfer of possession from one person to another.' However, for this suggestion to be feasible, further clarification on what constitutes delivery is necessitated.

Goods Act imminently or over the following years remains an unlikely prospect due to the sheer amount of work required. For such reasons, one final alternative suggestion is considered.

7.3 A floating charge?

7.3.1 Recharacterization of the retention of title clause

Another difficult issue emanating from the decision in *Bunkers* concerns the categorisation of the contract as *sui generis* which included a licence permitting the consumption. A *sui generis* contract with a licence permitting the activity which prevents the passage of title, is inherently problematic and might lead to the recharacterization of a retention of title clause as a registrable charge. In the context of the *Bunkers* case, the licence purporting to allow the consumption of goods, effectively allowed the seller's reserved property rights in the goods to be destroyed.[1058] Bridge argues that this may lead courts to question whether retention of title clauses should be recharacterized as a charge, given the substance of the clause and the weak proprietary rights reserved by the seller.[1059] Is the recharacterization of retention of title clauses as registrable charges the next logical[1060] step in progression? The answer to this question, remains to be seen. However, if this is the future for retention of title clauses, then a few basic points on the viability of recharacterizing the clauses as a company charge must be considered. The concept of retention of title clauses being recharacterized as a registrable charge is not a novel concept and has been initially mentioned in many proposals including the Diamond Report of 1989[1061], as well as by the Law Commission in their consultation paper on registration of security interests[1062], however no reform of the law concerning retention of title has developed further beyond the consultation period.

Applying a functional analysis, an agreement including a retention of title clause could be characterised as a floating charge. By doing so, this would not necessitate a brand-new type of contract as it could be a sale of goods contract combined with a security interest in the goods.[1063] In

[1058] M Bridge "The UK Supreme Court decision in The Res Cogitans and the cardinal role of property in sales law", *op cit* fn 892 at 359.
[1059] *ibid.*
[1060] Thornely advocates that retention of title clauses should 'logically' be recognised as a registrable security devices. See further, J Thornely "Romalpa clauses: the retreat continues' (1985) 44(1) *The Cambridge Law Journal,* 33-35, at 34.
[1061] A Diamond, *A Review of Security Interests in Property,* 1989, HMSO, otherwise known as the 'Diamond Report'. See in particular 9.3.2.
[1062] Law Commission, *Consultation Paper on Registration of Security Interests,* Law Com No 296 (2005), at 21.
[1063] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 264.

addition, the granting of security could be provided over a vast range of possible circumstances, which would essentially secure the different types of retention of title clause within the remit of the charge.[1064] To this end, if the aggregation and prolonged retention of title clause were to operate from the onset as a registered floating charge, then this would subsequently bypass the impossibly high threshold imposed on the retention of title clauses and would also evade the judicial reluctance of the courts in enforcing such types of clauses. A floating charge over the seller's assets could cover any raw materials and manufactured goods, and thus could extend to existing goods or future assets of an undertaking[1065], which would grant the seller the protection it requires without the incumbrance of the retention of title clause being struck down by the courts. In essence, the parties relying on the new mechanism would thus avoid the procedural barriers of creating a security interest held void for lack of registration.

By creating a floating charge over the goods in question, this would mean that the provisions of the Sale of Goods Act would still be applicable and henceforth would not require any redrafting or amendments. The main difference being that the sale of goods contract would recognise a proprietary right in the goods supplied, and it is this element which will provide sellers the protection in the event of the buyer's insolvency. How this would operate in practice is that the contract would be a contract of sale whereby title to the goods would pass on delivery, but subsequently the clause would create a floating charge over the goods for the benefit of the seller.[1066] This approach maintains the fundamental function of the retention of title clause which is to provide a degree of protection to the seller in the event of a buyer's insolvency and inability to pay the full purchase price. In addition, recognising retention of title clause as a security interest would subsequently necessitate minor changes to the basic terminology in which case the terms seller and buyer would change to creditor and debtor, where the creditor has a proprietary interest in an asset of the debtor which subsequently secures an obligation by the debtor. As such, the change in terminology would not be too much of a disposition to the involved parties and the terms would provide sufficient indication of what the roles of each party entail.

[1064] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 46.
[1065] See further *Re Panama, New Zealand and Australian Royal Mail Co* [1870] 5 Ch App 318.
[1066] This functional analysis is adopted by Article 9 of the US Uniform Commercial Code (UCC) whereby the law relating to security interests applies to 'a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract' as per Article 9-109(a)(1). See also s12(2) of the Australian Personal Property Securities Act 2009 (APPSA) and s17(3) of the New Zealand Personal Property Securities Act 1999 (NZPPSA).

One advantage of this suggestion is that the buyer or debtor can continue to use the goods in the ordinary course of business in which case the debtor is not disadvantaged in anyway with the change in characterisation. Ordinary course of business is given a wide definition, which entitles the debtor to use the goods in a way analogous to an owner such as reselling, consuming, disposing or destroying the goods, the latter types of uses requiring the consent of the secured creditor.[1067] Hence, this is in no way different to the function of the retention of title clause, in which case the buyer operates as if it were the true owner of the goods. Thus, the debtor can continue to use the goods for the purposes of business up until the point that the creditor enforces their security interest, which usually occurs on the insolvency of the debtor. In the event of insolvency, due to the nature of the proprietary interest granted to the secured creditor, the creditor is thus put in a more favourable position as a floating charge holder. Under the present law, parties who retain title have an effective proprietary interest in the goods supplied, an interest which does not require a recharacterization as a charge, and for such reasons it has super-priority over other interests and is not registrable.[1068] As such, the super-priority status afforded to retention of title claimants is considered to be of upmost importance and an element worth keeping if retention of title clauses were to be characterised as a floating charge. The Law Commission in its consultation paper, recommended that all types of retention of title clause should be registrable but to counterbalance this position, suggested that the simple retention of title clause should continue to benefit from the super-priority status whereby such clauses would be given priority ahead of pre-existing securing interests.[1069] Furthermore, Gullifer suggests that the super-priority status could be assigned to the new 'retention of title floating charge' to the extent of the interest securing an obligation to pay the price of the inventory it covers.[1070] Accordingly, the super-priority status would not be lost under the new characterisation of a retention of title clause as a floating charge. Any reform would have to contend with maintaining the super-priority status afforded to retention of title clause as without such priority, the characterisation as a floating charge would severely weaken parties priority position, subordinating charge-holders position behind fixed charged holders and preferential creditors. However, to retain the super-priority status, the rule must apply within narrow limits as evidently, if every secured creditor were to obtain a position of super-priority, this would render the rule completely futile.[1071] As such, assigning the super-priority status would have to operate in narrow limits.

[1067] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 264.
[1068] See *McEntire v Crossley Bros* [1895] A.C. 457 HL at [462]; *Armour v Thyssen Edelstahlwerke AG*, *op cit* fn 629 at [351-354], the super-priority is justified by bringing business new value from the goods.
[1069] Law Commission, *Consultation Paper on Registration of Security Interests,* Law Com No 296 (2005).
[1070] L Gullifer "'Sales' on Retention of Title terms: is the English law analysis broken?", *op cit* fn 60 at 265.
[1071] L Gullifer, "Retention of title clauses: a question of balance", *op cit* fn 209 at 288.

One of the main concerns with the recharacterization approach is the uncertainty that ensues. A key issue at present is the lack of certainty of the current framework and thus by introducing radical reform measures as suggested, this may cause further upheaval within the market. Would all mechanisms which perform the function of security be characterised into this new form? Put simply, what transactions would qualify for recharacterization? As emphasised by Calnan 'this is particularly problematical because issues of this kind are not ones which lawyers and judges are well qualified to answer.'[1072] Furthermore, it would also be uncertain whether this form of security interest would require registration, which poses further issues to consider.

7.3.2 The requirement of registration

The next difficult question relates to whether this new characterisation as a floating charge should be registrable. A controversial prospect with notable benefits and issues to take into consideration, all of which have been explored thoroughly in a previous chapter. To ensure that retention of title clauses strike an effective balance between competing interested parties, the clause would arguably have to be registered as a company charge. In this way, an appropriate balance between retention of title claimants, competing secured creditors and any insolvency representatives can be maintained. However, the ongoing debate surrounding whether retention of title clauses should be registered, remains highly controversial.

The main benefit of recharacterizing a retention of title clause as a floating charge, is that the existence of the rights would be effectively publicised as the registrations would be recorded within a system of registration. As the register is open for public inspection, this can effectively alert parties of the scope of a company's financial status and thus, arguably improve the overall transparency within the market. A transparent registration of security ensures that parties can be made easily aware of the existence of the security interest, and as such can make an informed decision based on the register information. To this end, imposing the requirement of registration would allow creditors to search the register to find out whether any security has been created, and thus enhancing transparency. A transparent registration system would also tackle the issue of false wealth, where a business appears to have more assets than it has, and as such a registration system could overcome such a problem.[1073] Additionally, costs are kept to a minimum as there are no notarisation fees, so registering a charge or searching the

[1072] R Calnan, "What Makes a Good Law of Security" in F Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions,* Cheltenham: Edward Elgar, 2015, at 471.
[1073] L Gullifer, "Retention of title clauses: a question of balance", *op cit* fn 209 at 287.

register would only incur a small fee and any solicitor remuneration.[1074] Accordingly, registering a security interest does not incur any other transactional costs which ensures that payments are kept to a minimum. The value of the registration system is that security interests can be created informally, and the register makes the security interests transparent for third parties.[1075]

Imposing the requirement of registration on this newly categorised retention of title would provide one way of capturing interests which would otherwise not be grouped as involving the creation of a security interest, despite their equivalent function of security. This would be beneficial as it would ensure that similar mechanisms are treated the same by the law, and thus simplifying the legal process to a certain extent. This would serve the courts as courts expend great time in deducing whether the retention of title provision in question constitutes a registrable charge.[1076] This would follow the approach taken by other common law systems which treat transactions which serve the function of security as secured transactions such as Australia and the United States.[1077]

This may also provide a degree of uniformity to this area of law, by reducing the possible avenues in which creditors can gain priority in the insolvency process, ahead of the claims of other secured lenders and unsecured creditors. The courts would thus be able to strike an appropriate balance back to determining priority as competing security interests which are subjected to the hierarchal order of the *pari passu* principle. This may solve some of the current dissatisfaction of the existing priority rules, which at present can be bypassed relatively easily by the use retention of title clauses which involve the use of absolute title by way of security.[1078] Once the newly characterised charges have been registered, the priority afforded to the charge holders will be effected based on the date of creation. From the perspective of the seller, registration is necessary to preserve his priority. Accordingly, the priority afforded to fixed charge holders will be determined on the order of creation and it is common practice for creditors of floating charges to enter into a priority agreement with secured creditors to promote awareness amongst creditors.[1079] This in turn will produce a degree of fairness as the system of registration would be consistent with the general rule that earlier claims

[1074] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 50.
[1075] R Calnan, "What Makes a Good Law of Security", *op cit* fn 1072 at 475.
[1076] See *Borden (UK) Ltd v Scottish Timber Products* [1981] Ch 25; *Compaq Computer Ltd v Abercorn Group Ltd, op cit* fn 642; *Pfeiffer Weinkellerei- Weineinkauf GmbH & Co v Arbuthnot Factors Limited, op cit* fn 648. *Re Peachdart Ltd, op cit* fn 124.
[1077] See further section 81 of the Australian Personal Property Securities Act 2009.
[1078] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 59.
[1079] The author acknowledges that the priority rules subjected to charges are largely dependent on the nature of the assets and that floating charges are governed under different rules, which has received considerable criticism for its lack of simplicity and clarity. See further, G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 61.

should prevail over later claims, thus promoting fairness amongst charge holders. Securing the title retaining hybrid within the scope of registration would bring a degree of uniformity within this area of law.

The main opposition to the characterisation of retention of title clause is the issues surrounding registration under the current English law relating to registration of company charges. This notion has been discussed at various points of this thesis. The fundamental issue with the process of registration, is that registering each individual interest would be incredibly burdensome and almost impractical for suppliers of goods. In the commercial environment, it is common practice for goods which are subject to a retention of title clause to be delivered over a prolonged period of time. If the date of creation purports to cover every single delivery invoice, then this would be considered extremely burdensome on behalf of the seller or supplier. Accordingly, 'it is simply not feasible to expect a seller to register each contract of sale individually.'[1080] Due to the ubiquity of retention of title clauses in the commercial market, if the clause were to constitute a registrable charge, the burden of registering for thousands of customers would be completely impractical and highly onerous. Although it has been acknowledged by Bridge that this may not be as problematic as initially thought for instances involving retention of title clauses for goods with limited shelf life and value[1081], the author respectfully disagrees with this claim as the question remains whether there is any benefit for suppliers of goods to register their interest for goods of such low value and short duration of existence. Since most retention of title clauses transactions are transient in nature, it is questionable whether a system of registration is the most viable option. It is abundantly clear that the process of registration would be impractical for suppliers of repeat supply contracts who would have to duly register on each and every occasion.[1082] Due to the short-term nature of many of these transactions, this reduces the benefit of registration and may accrue costly expenses for the sellers. At present it is also argued that retention of title clauses do not intrude on bank's security and as such the notion of reforming the law to register such interests may correspondingly have negative impacts on other parties within the financial market. The inconvenience of registering may lead to conflicts with existing bank lenders which may inhibit borrowing for buyers.[1083] In line with this reasoning, McCormack emphasises that 'legal advisers, however, feel comfortable with the existing precepts, and the advantages of familiarity are not easily forsaken. Moreover, and more importantly, the credit industry as a whole- and banks in particular-

[1080] G McCormack, *Registration of Company Charges, op cit* fn 515 at 73.
[1081] M Bridge "The UK Supreme Court decision in The Res Cogitans and the cardinal role of property in sales law" *op cit* fn 892 at 359.
[1082] See *Armour v Thyssen Edelstahlwerke AG, op cit* fn 629.
[1083] A Hicks "Reservation of Title: A Pious Hope", *op cit* fn 173 at 105.

see no obvious merits in moving over to a new system and this reluctance seems well founded.'[1084]Accordingly, from the perspective of banks and other lending institutions, the current law has much to commend it and does not warrant radical change by registering such interests.[1085] If all retention of title clauses should be changed to create a registrable charge, there may be reluctance from parties who will have to regularly enforce their own charges in priority.[1086]

It is argued that the provisions relating to the registration of company charges are not drafted to accommodate retention of title clauses. For a charge to be registered, one of the most fundamental requirements is to list the date of creation of the charge. This issue can be problematic in situations where the contractual agreement includes more than one type of retention of title clause. If a contract of sale purported to include a simple and aggregation retention of title clause, then it would be difficult to determine which date of creation would be applicable if the clause constituted creating a charge. This issue was raised by McCormack, 'what if a contract of sale of goods includes an aggregation clause as well as simple reservation of title provision- is the date of creation, the date of the making of the original supply contract or the date of manufacture?'[1087] Such a situation raises vital uncertainties which can undermine the effectiveness of registering charges. In practical terms, if the date of creation referred to the aggregation clause, then it would be seemingly impossible for the seller to complete the registration requirement as the seller would not be precisely aware when the goods were to be mixed in the manufacturing process.[1088] Accordingly, the provisions relating to the registration of company charges are not adequately adept to accommodate retention of title clauses at present.

Clearly under the current law of registering company charges, imposing the requirement of registration on a new categorisation of a retention of title floating charge would be incredibly burdensome for sellers who would have to deliver certified charge documentation for the purposes of registration. The only way the requirement of registration would be commercially feasible would be if the entire system were to be reformed into a notice filing system[1089], in which case the process of registering interests would be as accessible as possible, a process which can be used in a rapid and

[1084] G McCormack, *Secured Credit under English and American Law, op cit* fn 256 at 69.
[1085] *ibid* at 68.
[1086] D Fox, R Munday, B Soyer, A Tettenborn, P Turner, *Sealy and Hooley's Commercial Law: Text, Cases, and Materials, op cit* fn 42 at 484.
[1087] G McCormack, *Registration of Company Charges, op cit* fn 515 at 73.
[1088] *ibid.*
[1089] The notion that English law should be reformed to a system of notice filing, similar to the US position under Article 9 of the UCC has been extensively documented. See generally, G McCormack, *Secured Credit under English and American Law, op cit* fn 256; G McCormack "Notice Filing versus Transaction Filing- A Comparison of the English and US Law of Security Interests" (2002) 5 *Insolvency Lawyer,* 166-174; D Baird "Notice Filing and the Problem of Ostensible Ownership" (1983) 12(1) *The Journal of Legal Studies,* 53-67

cost-effective manner. Arguably, a notice filing system would ensure a degree of flexibility and convenience for all parties involved. However, as summarised aptly by Calnan 'the practical problems associated with trying to require the registration of quasi-security outweigh any benefit that might be obtained from registering them.'[1090] The debate on whether the requirement of registration should be imposed remains a contentious matter.

7.4 Summary of proposals

In summation, this section has explored possible responses to the problems identified throughout the course of this thesis. The first suggestion is tailored to providing a short-term solution to the uncertainty caused by the decision of *Bunkers* of categorising contracts including a retention of title clause as not contract of sales but controversially as *sui generis* contracts. As such, the first suggestion advocates for the revaluation of the passing of property, whereby title passes immediately before the goods are consumed or destroyed, and thus ensuring that any future cases analogous to the *Bunkers* case would firmly fall within the familiar context of the law of sale of goods.

The second suggestion put forward would not warrant immediate and urgent reform if the first proposal would be adopted as the non-applicability of the Sale of Goods Act would be directly addressed. As aforementioned, any future cases involving a retention of title clause which subsequently mirrors the contextual background of the *Bunkers* litigation would once again be characterised as a contract for sale, rather than a *sui generis* contract. Accordingly, this solution would address one inherent problem of the non-applicability of the Sale of Goods Act 1979 for contracts of sale on retention of title terms. However, this would not address the problematic issues of the inherent unsuitability of the current Sale of Goods Act, which fails to reflect the modern business context and thus, the practical environment in which retention of title clauses operate. Due to the complexities involved in advancing with the second proposed suggestion, it is argued that amending or reforming the Sale of Goods Act should be part of a much wider initiative for reform to ensure that the Act remains a progressive piece of legislation. It is conceded that any changes in line with the second proposals which advocates for statutory intervention will not be done on an imminent timescale but it is hoped that such matters will be addressed at some point in the forthcoming years.

[1090] R Calnan, "What Makes a Good Law of Security?", *op cit* fn 1072 at 479.

The third suggestion once again requires substantial work to be feasible and must consider all the relevant factors, most of which have been referred to above. The recharacterization of the retention of title clause must be done in a way which accommodates the main advantage associated with the clauses under the present regime, which is affording the retention of title claimant with super priority status. Without maintaining this advantage, it is difficult to justify any radical reform measures. However, by far the most controversial aspect of the third suggestion is whether to impose a requirement of registration. There is still substantial divergence as to the correct recourse for this and thus, the author eagerly awaits how this area of law will develop in the future considering the arguments opposing and proposing the requirement of registration. Evidently, the second and final suggestions are catered for providing more robust and comprehensive long-term solutions and as such should be part of a wider initiative for reform. It is acknowledged that such proposals for reform are highly technical but it is hoped that the above discussion can in some way aid and contribute to any future reform initiative efforts. In addition, the suggested proposals outlined in this section intend to illustrate how the current research enquiry can be developed further for future research.

7.5 Conclusion

This research has demonstrated that the way in which the courts have dealt with retention of title clauses thus far, has been significantly problematic and disjointed. The fragmented and incoherent approach to retention of title clauses can be evidenced across a broad range of legal disciplines, spanning from the law of sales to the law of agency, to the way the clauses are handled during insolvency proceedings. The general reluctance of the courts to enforce such claims can be seen from the way the clauses are interpreted as a contractual provision, the way the interest of the seller is categorised and how the intention of the parties is construed by the courts with regards to retaining title to goods supplied. Evidently, the piecemeal and ad hoc way in which these types of clauses have been dealt with by the courts, exacerbates the uncertainty of law in this area and serves to obstruct parties from implementing their retention of title clauses in an effective and functional manner. It has been argued that the recent judicial outcomes of cases have produced detrimental and uncommercial implications which have hindered the functionality of the retention of title clauses to the point of insurmountable legal uncertainty. The consequences of the decisions reached were unpredictable and have disrupted any shred of consistency achieved up until the last decade or so. The courts fail to consider not only the commercial practicality of such decisions but also fail to take into account the systematic consequences of such outcomes, which bears unprecedented uncertainty for those parties seeking to rely on retention of title clauses. Recent judicial decisions such as *Wilson v Holt* and *Bunkers* demonstrates a complete change of direction from preceding cases, which has invariably led to

complexities and far-reaching consequences. It is contended that insufficient consideration has been given to the true construction of retention of title clauses which has inevitably prevented judicial decisions from providing the legal certainty desired and required for achieving the clauses functional objectives.

Difficulties with legislation and terminology has also been exposed whereby the legislative basis fails to reflect the modern environment or understand the nature of the clauses and the way they operate as a quasi-security device. The unnecessary definition prescribed to retention of title clauses under the Insolvency Act 1986 as a 'hire-purchase arrangement' and the antiquated terminology employed by the Sale of Goods Act 1979, demonstrates this point clearly. It is fair to say that the clauses are hindered by legislative uncertainty and controversial judicial decisions and reasoning.[1091] The lack of any clarification in the legislative instrument has resulted in the piecemeal development of the law which is left in an uncertain state. From a terminological perspective, the utility of retention of title clauses is hindered either by the lack of existing definitions provided by relevant legislation or is hampered by the inconsistent approach to terminology and contractual interpretation employed by the courts.

As argued throughout this thesis, retention of title clauses have been treated in a cursory way by the courts, which has led to difficult legal implications, and often produces contradictory and unpredictable results for sellers. As evidenced by the spate of cases, different rationales are employed by the courts to suit different circumstances, which makes it entirely impossible for this area of law to be coherent and uniform. As highlighted previously, this judicial hostility obstructs the functional objectives of retention of title clauses as its proven exceptionally difficult to draft a clause which the courts will enforce.[1092] The lack of overriding guidelines pertaining to this area of law, leads to many disputes about both the interpretation and application of retention of title clauses, resulting in a lack of uniformity and predictability for those seeking to rely on such clauses in similar contexts. The eagerness of the courts to strike down such clauses on a relatively consistent basis renders sellers in a vulnerable and dismal position of being left with an unsecured claim for the supplied goods. This thesis has demonstrated that as a commercial mechanism, retention of title clauses have been obstructed by legal uncertainty and general reluctance in enforcing claims pertaining to title retention. Such obstruction has detrimentally impacted on the primary objectives of these clauses which is to mitigate sellers' risk and to afford parties priority in the event of a buyer's insolvency, neither of which

[1091] For the discussion on legislative uncertainty see sections 3.3 and 6.1.2. For an analysis of the controversial judicial decisions and reasoning see sections 5.2 and 5.3.
[1092] See section 4.4.

is accomplished if the seller is left with an unsecured claim for the supplied goods. The wording of retention of title clauses is of upmost importance and is arguably the critical component as to whether the provision will be effective in retaining title to the goods supplied. Despite the availability of different types of retention of title clauses, the courts impose an increasingly challenging and highly technical threshold to meet for the precise wording of the different clauses and as evidenced, falling short of this standard will result in the retention of title clause being struck down by the courts.[1093] Under the present legal regime, it is almost impossible for more complicated retention of title clauses such as a prolonged or aggregation clause to succeed[1094], which is of great detriment to those seeking to rely on the clauses as a way of mitigating risk.

By way of summary, this thesis has arrived at a number of deductions, most importantly that there is still substantial uncertainty and difficulty in resolving claims involving retention of title clauses. Old and recent legal developments discussed throughout the course of this thesis, serve to support the contention that legal developments continue to herald an uncertain era for claimants seeking to rely on retention of title claims. Clearly, retention of title clauses as a commercial mechanism are continuously hindered from achieving their functional objective of mitigating sellers' risk in the event of a buyer's insolvency. As encapsulated aptly by Finch 'poor information on the use of quasi-security devices and legal unknowns produce unnecessary uncertainties; and that quasi-security devices do not, in reality, deliver real protection for creditors who resort to them.'[1095] As evidenced throughout this thesis, it is apparent that retention of title clauses are hindered from achieving their primary objective of providing protection to the seller in the event of an insolvent buyer by significant conceptual and practical issues. Retention of title claimants are subjected to significant hindrances in the wake of insolvency proceedings and potential barriers to the use of retention of title clauses are caused by the statutory moratorium. Recent judicial decisions have also impacted the way these clauses are used in practice by limiting the available options for suppliers to effectively use the clauses as a defensive mechanism in times of economic hardship. The combined impact of both the courts inconsistent and reactive approach to insolvency matters and the unnecessary separate definition of retention of title clause enshrined in the legislation, evokes further uncertainty and ambiguity for the operation of retention of title clauses in the insolvency market.

[1093] Revert back to Chapter 4 for an in-depth discussion on the nuances in contractual agreements which result in the courts striking down retention of title clause and to exhibit the difficult threshold that retention of title claimants have to meet when specifically dealing with aggregation retention of title clauses.
[1094] See sections 4.4.3 and 4.4.4 for a comprehensive discussion on the difficulties of prolonged and aggregation retention of title clauses.
[1095] V Finch, *Corporate Insolvency Law: Perspectives and Principles, op cit* fn 190 at 464.

The profound uncertainty and unpredictability around the legal position of a retention of title clause complicates matters tenfold and as such the depiction of this area of law as a legal minefield remains more relevant than ever. By focusing on how the clauses are hindered from achieving their functional objectives, the research has highlighted a number of significant issues pertaining to the current legal position of retention of title clauses.

Clearly, the clauses are predominantly obstructed by legal uncertainty and judicial disfavour, which has been repeatedly demonstrated across the array of legal fields in which these clauses operate. The ramifications of the current legal position, exacerbated by the general reluctance of the courts to enforce the clauses and the flawed direction adopted by the courts in recent judicial decisions, reinforces the argument that there is still much uncertainty and unpredictability in the legal position of retention of title clauses. It is almost impossible[1096] for retention of title clauses to operate effectively under the present regime as often the clauses will be struck down by the courts or thwarted from retrieving the supplied goods. It can be claimed that retention of title clauses as a commercial mechanism do not in fact mitigate the risk of a non-paying buyer effectively. Evidently, the clauses are not providing sellers with an economic lifeline during the event of an insolvent buyer, as it has become increasingly common for the clauses to be rendered ineffective by the courts for issues with incorporation, inferring the creation of a registrable charge, constituting a contract of agency, characterised as a *sui generis* contract or that the title retention claim is heavily disputed during insolvency proceedings. All these issues have undoubtedly had huge repercussions for the practical operation of retention of title clauses and leaves significant uncertainty as to their standing. Thus, the law in relation to retention of title clauses is destabilised by uncertainty and it is contending that the law is confusing, contradictory, and unsatisfactory in its current form.

In recognition of the uncertainty as to the current standing of retention of title clauses, three proposals were put forward for a reanalysis of the legal position pertaining to retention of title clause. It was felt that the three proposals directly addressed the most problematic issues obstructing the functional objectives of retention of title clauses. The first proposal advocated for the revaluation of the passing of property, whereby title passes immediately before the goods are consumed or destroyed. The second recommendation suggested statutory intervention with the amendment and redrafting of the Sale of Goods Act 1979 as part of wider reform initiatives. The final suggestion examined the viability

[1096] The only type of retention of title clause which effectively operates with very little contention is the simple retention of title clause. See section 4.4.1 for further detail.

of the recharacterization of retention of title clauses as a registrable charge. The potential merits and difficulties of each proposal were examined in detail and it was contended that any future reform initiatives must take into account the super-priority status afforded to sellers under the current regime.

7.6 Concluding remarks

By way of a final conclusion, this thesis has sought to explore the breadth of the legal minefield relating to retention of title clauses and the various deficiencies and unpredictable ramifications in English law. The arguments put forward have demonstrated the interplay between the varying legal fields which often leads to significant legal uncertainty on the practical operation of retention of title clauses. The reactive and piecemeal approach adopted by the courts has led to an unsatisfactory development of the law, which has continuously undermined the functional basis of retention of title clauses. Areas of legal uncertainty, inconsistency and unpredictability have thus been highlighted to illustrate the difficulties encountered when seeking to rely on such clauses under the present regime. In considering the central research question of this thesis, the arguments put forward have evidenced that the current legal environment lacks the certainty, consistency and predictability required to accommodate the functional objectives of retention of title clauses.

The proposals suggested in this final chapter, generate their own set of complications and evidently, reforming this area of law will not be a straightforward accomplishment. Nonetheless, it is argued that there is a strong case for a proactive and strategic reform process to address the significant issues which impact retention of title clauses as a functional mechanism for their objective. Reforming this area of law is the only viable option to navigate a path through this current legal minefield. The legal minefield, in the absence of reform, is likely to remain.

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